INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 374

ALBERT YAKUS, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 375

BENJAMIN ROTTENBERG AND B. ROTTENBERG, INC., PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court (No. 375, R. 59–67) is reported in 48 F. Supp. 913. The opinion of the Circuit Court of Appeals (No. 374, R. 42–56; No. 375, R. 68–82) is reported in 137 F. (2d) 850.

566854—44——2

JURISDICTION

The judgments of the Circuit Court of Appeals for the First Circuit in both cases were entered on August 23, 1943 (No. 374, R. 56; No. 375, R. 82). The petitions for writs of certiorari were filed in this Court on September 22, 1943. Certiorari was granted in both cases on November 8, 1943, and the cases were consolidated for argument (No. 374, R. 56; No. 375, R. 83). Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 204 (d) of the Emergency Price Control Act of 1942 operates to prevent consideration of the validity of maximum price regulations in suits for enforcement of the Act, including criminal prosecutions.

2. Whether Section 204 of the Act, in providing an exclusive procedure for judicial review of maximum price regulations under the Act, and in prohibiting consideration of the validity of such regulations in suits to enforce the Act, contravenes the Fifth and Sixth Amendments of the Federal Constitution or works an unconstitutional legislative interference with the judicial power.

3. Whether, to the extent here involved, the exclusive statutory procedure established in Sec-

tions 203 and 204 of the Act for administrative and judicial review of regulations meets the requirements of procedural due process.

4. Whether the Act involves an unconstitutional delegation of authority to control prices.

STATUTES AND REGULATION INVOLVED

The Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. Supp. II, sec. 901 *et seq.*) will be found in the Appendix. The Act of October 2, 1942 (56 Stat. 765, 50 U. S. C. App., Supp. II, sec. 961 *et seq.*) will also be found in the Appendix. Sec. 7 (b) of the October 2 Act makes applicable the penalties and other provisions of the Price Control Act where authority is delegated to the Price Administrator. For such delegation, see Executive Order 9250, 7 Fed. Reg. 7871, issued October 3, 1942, covering agricultural products and commodities processed therefrom.

Revised Maximum Price Regulation No. 169 is published in 7 Fed. Reg. 10381 *et seq.* The applicable provisions are Sections 1364.451–1364.455, establishing maximum prices for sales of wholesale cuts of beef, and Section 1364.401, prohibiting such sales at prices above the maximum established. The Statement of Considerations accompanying the Regulation will be found in OPA Serv. 41: 339 *et seq.*

Revised Procedural Regulation No. 1, issued on November 2, 1942, is published in 7 Fed. Reg. 8961 *et seq.*

Copies of these Regulations and of the Statement of Considerations will be handed to the Court.

STATEMENT

Petitioners in both cases seek review of judgments of the Circuit Court of Appeals for the First Circuit which affirmed judgments of conviction against petitioners in the District Court for the District of Massachusetts (No. 374, R. 12; No. 375, R. 26) under indictments charging sales of wholesale cuts of beef at prices above the maximum legal prices established by Revised Maximum Price Regulation No. 169 (No. 374, R. 1-4; No. 375, R. 1-13).[1] In No. 374, peti-

[1] The indictments against the individual and corporate defendants in No. 375 were consolidated for trial and on the appeal below (No. 375, R. 20, 68). By stipulation (No. 375, R. 57–58) only the pleadings as to the individual defendant were printed in the record for the Circuit Court of Appeals, which is incorporated as part of the present Record. The pleadings as to the corporate defendant are similar to those in the present Record.

The regulation prescribed certain basic prices (called Zone Prices) for the respective grades of beef carcasses and wholesale cuts (sec. 1364.452). From these basic prices certain deductions were required to be made and certain additions were permitted to be added. Of these additions and deductions the only ones material here are those provided for in subdivisions (b) and (c) of section 1364.453 and subdivision (d) of section 1364.454. Originally subdivisions

tioner was found guilty under three counts, and received a concurrent sentence of six months' imprisonment and one thousand dollars fine (No. 374, R. 13). In No. 375, petitioner Benjamin Rottenberg was found guilty under fourteen counts, and received a concurrent sentence of six months' imprisonment and one thousand dollars fine. The corporate defendant-petitioner in No. 375 was found guilty under fifteen counts, and received a concurrent sentence of one thousand dollars fine (No. 375, R. 27, 30).

Petitioners filed pleas of not guilty in the District Court (No. 374, R. 5; No. 375, R. 13–14), but there is no dispute that they were guilty of violations. The District Court overruled a number of motions and requests for rulings raising defenses of law. Among the contentions so

(b) and (c) of section 1364.453 provided that a carload discount of 75 cents per cwt. should be deducted from the basic zone prices on carload sales and that a wholesaler's discount of 50 cents per cwt. should be deducted from the basic prices on less-than-carload sales to wholesalers; subdivision (d) of section 1364.454 provided that wholesalers might add a wholesaler's selling addition of 25 cents per cwt. to the basic prices. In effect, therefore, the regulation allowed wholesalers a margin of $1.00 per cwt. if they purchased in carload lots and a margin of $0.75 per cwt. if they purchased in less-than-carload lots.

Subsequent revisions, not here material, were made. By an amendment issued on June 7, 1943 (Amendment 15, 8 Fed. Reg. 7675), the carload and wholesalers' discounts were abolished and a quantity discount varying from 37½¢ per cwt. to 62½¢ per cwt. was substituted. By the same amendment the wholesalers' selling addition was increased from 25 cents to 37½ cents per cwt. On June 24, 1943, the quantity

overruled were the following: that the Regulation is invalid and that an offer of proof of such invalidity should be received (No. 374, R. 7–12, 14–16, 17–24, 26, 28, 31; No. 375, R. 16–20, 23–26, 32–37, 38–41, 42, 61–67);[2] that Section 204 (d) of the Act (the "exclusive jurisdiction" provision) should not be construed to bar such an assertion of invalidity or an offer of proof thereof (No. 375, R. 37, 50, 62–63); that Section 204 (d) is unconstitutional if construed to bar consideration of the validity of the Regulation (No. 374, R. 13–16, 25–26; No. 375, R. 23, 37, 38, 61–67); and that the Act makes an unconstitutional delegation of power to control prices (No. 374, R. 7,

---

discount was abolished and the carload and wholesalers' discounts of 75 cents and 50 cents per cwt., respectively, were restored (8 Fed. Reg. 8756). On July 16, 1943, the carload discount was reduced to 25 cents per cwt., the wholesalers' discount was abolished, and the wholesalers' selling addition was increased to 75 cents per cwt. (8 Fed. Reg. 9995), thus again allowing wholesalers a margin of $1.00 per cwt. if they purchased in carload lots and a margin of $0.75 if they purchased in less-than-carload lots.

[2] The defendants challenged the validity of the Regulations by motions to quash and motions in arrest of judgment on the grounds (1) that the Regulation was too vague and indefinite; (2) that it arbitrarily and unreasonably established prices too low; (3) that it failed to fix maximum prices for livestock; (4) that it was not supported by findings sustained by evidence; (5) that it was issued without prior approval of the Secretary of Agriculture; and (6) that it failed to allow a generally fair and equitable margin for processing (No. 374, R. 7–12, 14–16; No. 375, R. 16–20, 23–24). In No. 374 the defendant offered to prove by the testimony of Prentiss M. Brown, then Price Administrator, that the

10, 26, 27; No. 375, R. 15, 16, 18, 19, 38–39, 40, 59–61, 82). In No. 375 the District Court rendered a comprehensive opinion on the issues of law (R. 59–67).

The Circuit Court of Appeals, in affirming the convictions, held that Section 204 (d) of the Act operates to bar the attack sought to be made by petitioners against the Regulation; that Section 204 (d), as so construed, is constitutional; and that the Act does not improperly delegate legislative power to the Administrator of the Office of Price Administration (No. 374, R. 42–56; No. 375, R. 69–82).[3]

SUMMARY OF ARGUMENT

I

1. The courts below properly held that petitioners could not challenge the validity of the applicable price regulation in this proceeding. Section 204 (d) of the Act expressly provides that the validity of price regulations may be

---

Regulation failed to allow an equitable margin for the processing of beef (No. 374, R. 18), and that compliance with the Regulation would require defendant to sell his products at prices lower than actual cost (No. 374, R. 19–23). In No. 375 the defendants offered to prove the average cost to wholesalers at Boston of dressed carcasses and wholesale cuts of beef based on the cost of livestock at Chicago and the cost of transporting, handling, and slaughtering, as well as incidental losses and expenses (No. 375, R. 32 *et seq.*).

[3] Petitioners have at no time attempted to obtain administrative or judicial relief in accordance with the available statutory procedures. See p. 32, n. 11, *infra*.

considered only in the Emergency Court of Appeals and on review in this Court. The record in such proceedings is formulated by protest or application for adjustment addressed to the Administrator, together with his action thereon. This provision for exclusive review is part of the procedural pattern of the statute, which is designed to protect against the premature interruption and disparate enforcement of wartime inflation control, and which at the same time affords to aggrieved persons an orderly avenue of administrative and judicial review. The protest procedure affords full opportunity to challenge a regulation, with an opportunity to be apprised of data considered by the Administrator and to rebut it. Oral hearings are not precluded where appropriate. The Emergency Court of Appeals has all the powers of a Federal District Court and is in a position to safeguard the interests of complainants.

2. In precluding an attack on the regulation in this proceeding, Congress acted under the war powers to preserve continuity of control and uniformity and expertness of review. The procedure, moreover, is fortified by established principles of administrative law. In criminal proceedings a regulation may not be challenged as invalid where there has been a failure to exhaust administrative remedies (*Bradley* v. *City*

of Richmond, 227 U. S. 477; cf. *United States* v. *Corrick,* 298 U. S. 435). The principle has been applied, for example, to prosecutions under the Interstate Commerce Act where a person has violated an order or a legal tariff which has not been set aside through resort to the administrative process (*Lehigh Valley R. Co.* v. *United States,* 188 Fed. 879; *United States* v. *Vacuum Oil Co.,* 158 Fed. 536). Cases under the Selective Service Act are similar.

3. Special objection has been made to the provisions of the Act which prohibit stays and interlocutory injunctive orders by any court, including the Emergency Court of Appeals. Petitioners have not sought relief by application to the Administrator and may not be in a position to attack the stay provisions. (Cf. *Anniston Manufacturing Co.* v. *Davis,* 301 U. S. 337.) Moreover, a stay is not a matter of absolute right under the Constitution. (See *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4, 10.) In the present statute Congress has generalized what would undoubtedly have been proper judicial practice governing the issuance or denial of stays, since that practice gives special weight to the public interests affected. The principle that vital public interests will not be set at naught by the granting of interlocutory relief in

the absence of overwhelming private need finds its most frequent application in cases involving property rights. (See *Phillips* v. *Commissioner*, 283 U. S. 589, 595, and cases there cited.)

Congress itself in several instances has crystallized a rule against interlocutory injunctive relief. R. S. 3224, in the field of taxation, is essentially this kind of statute. The District of Columbia World War Rent Act and the National Prohibition Act contained provisions against interlocutory relief which were sustained. See *Block* v. *Hirsh*, 256 U. S. 135, 157–158; *Cywan* v. *Blair*, 16 F. (2d) 279.

The decision in *Ex parte Young*, 209 U. S. 123, and the cases which have followed it, are not opposed to our position. In the first place, in holding that there was a right to a stay of penalties threatened by criminal prosecutions those cases emphasized the fact that the statutes under consideration provided no method of challenge save by defending in criminal actions, and where violations of the statute would subject the individual to oppressive penalties all effective avenues of redress were blocked. (See *Wadley Southern Railway* v. *Georgia*, 235 U. S. 651, 662.) In the present Act orderly challenge may be made by administrative protest and judicial review. Moreover, for the most part the cases relied on by petitioners involved the element of continuing

confiscation in relation to public-utility regulation. In the present case there is no constitutional right that regulation under the war powers shall yield a fair return to everyone. Finally, it would be wholly incompatible with the functioning of the price-control law to follow the practice pursued in public-utility cases. The giving of a bond, for example, would not serve to protect against the evils of inflation.

If we are sensitive to the actual perils of inflation, we must look elsewhere for analogies,—for example, to the decisions rejecting claims to preliminary hearings and interlocutory relief where action is taken to control the spread of disease. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 17–18, 27–28.

It may be observed that in the case of revocation of licenses, not involved here, the statute requires a judicial order and makes provision for stays. (Compare *Porter* v. *Investors Syndicate*, 286 U. S. 461; *id.*, 287 U. S. 346.)

II

The price control provisions of the statute do not involve an unlawful delegation of legislative power. The standards are fully as definite as those which have been sustained in statutes regulating rates, wages, and prices.

ARGUMENT

I

THE COURTS BELOW PROPERLY BARRED THE ATTACK ON REVISED MAXIMUM PRICE REGULATION NO. 169 IN RECOGNITION OF THE EXPRESS RESTRICTIONS CONTAINED IN SECTION 204 (d) OF THE EMERGENCY PRICE CONTROL ACT

In seeking to challenge the validity of Revised Maximum Price Regulation No. 169 in this proceeding, petitioners have disregarded the statutory procedure provided in the Price Control Act. The validity of that procedure, particularly the limitations in Section 204 (d) of the Act, is here in issue.[4] Petitioners' contentions respecting Section 204 (d) may be summarized as follows: (1) that the Section does not operate to prevent consideration of the validity of the Regulation in this suit; (2) that if the Section does so operate, it is unconstitutional as a violation of petitioners' rights under the Fifth and Sixth Amendments and as an invasion of the judicial function; and (3) that the statutory procedure for review of regulations,

[4] The validity of Revised Maximum Price Regulation No. 169 is not before this Court. It is, however, before the Emergency Court of Appeals at the present time. (See, *e. g.*, *Heinz et al.* v. *Bowles*, No. 102, Em. Ct. App., now pending.)

Petitioners have set out fragments of testimony before a House Committee (Brief in No. 375, pp. 39–42), relating to the position of so-called nonprocessing slaughterers under the Regulation, with special reference to the then absence of a

afforded by Congress as a substitute for the avenues of review barred by Section 204 (d), fails to meet the requirements of procedural due process.

Contentions (1) and (2), *supra*, raise the primary issues in the case; in view of petitioners' failure to try out the available statutory review procedure, it is questionable whether the issues of procedural due process raised under contention (3), *supra*, are properly presented here, save perhaps those which are raised on the face of the statute. (Cf. *Anniston Manufacturing Company*

---

legal maximum on livestock prices. Petitioners are not in the category discussed, but are wholesale dealers, whose prices are fixed in accordance with margins described in note 1, p. 4, *supra*. The Administrator's position regarding the Regulation is set forth *in extenso* in an opinion dated October 27, 1943, in the Record in the *Heinz* case, *supra* (pp. 55–136), and special reference is there made to the problem of the nonprocessing slaughterers (pp. 76–81). The latter were given an additional payment through Defense Supplies Corporation, by order of the Economic Stabilization Director on October 26, 1943 (*id.* 128–136), conditioned on purchasing livestock within a price range therewith established. The Administrator's opinion states (*id.* 81): "The institution of measures to correct the hardship of which they complain removes the basis for the only substantial objection to the Regulation which has been presented." In a letter to the Attorney General on March 13, 1943, the former Administrator, Prentiss M. Brown, stated that "no evidence which has thus far been brought to my attention establishes that the regulations fixing ceiling prices for meat, if adequately enforced, are inconsistent with the standards of the Emergency Price Control Act or the McKellar Amendment" (*id.* 82–83).

v. *Davis*, 301 U. S. 337, 354–355; *Hall* v. *Geiger-Jones Company*, 242 U. S. 539, 554; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 542, 544–545.) Nevertheless the procedure which petitioners have failed to invoke will be discussed as part of a full description of the statutory plan of exclusive review to which attack is chiefly directed.

A. THE EXCLUSIVE REVIEW PROCEDURE AND THE CONSIDERATIONS IMPELLING ITS ADOPTION

Section 204 (d) of the Act is the keystone of the plan established in Sections 203 and 204 of the Act for administrative reconsideration and judicial review of maximum price and rent regulations issued pursuant to Section 2 of the Act. The Emergency Court of Appeals has been created (Section 204 (e)) as the exclusive judicial forum under this statutory plan, with review by writ of certiorari in this Court. In the interests of maintaining continuity of the price and rent controls while they are thus being judicially tested, however, the Act provides that the Emergency Court shall not issue interlocutory orders and that the regulations shall remain in force until final action by this Court (Sections 204 (e), 204 (d)). By the provisions of Section 204 (d) the exclusive jurisdiction thus vested in the Emergency Court of Appeals and this Court, to be exercised in proceedings instituted under the

statutory procedure, is preserved from infringement by any other tribunal in any other type of proceeding.

In effectuation of this purpose, Section 204 (d) imposes certain limitations upon the jurisdiction of all courts outside the statutory review forum. These limitations may best be understood in terms of a twofold classification of suits arising under the Act: (1) suits to prevent or interfere with enforcement or operation of maximum price and rent regulations, *i. e.*, suits initiated in an attempt to have these wartime controls suspended or set aside, the situation presented in *Lockerty* v. *Phillips*, 319 U. S. 182; and (2) suits to enforce the regulations under the provisions of Section 205 of the Act, the situation presented in this suit.

In the first class of suits mentioned, the effect of Section 204 (d) is simply that the plaintiff may not have relief except in a proceeding instituted in the Emergency Court of Appeals under Section 204 of the Act. This aspect of the exclusive review plan was upheld in the *Lockerty* case, *supra*. In the second class of suits mentioned, enforcement suits, the applicable language of Section 204 (d) is that the Emergency Court of Appeals, and this Court on review of its judgments, "shall have exclusive jurisdiction to determine the validity" of regulations, and the further provision that no other court "shall have jurisdiction or power to consider the validity" of

regulations. The defendant in an enforcement proceeding is free to raise all proper defenses addressed to the constitutionality of the Act itself as distinct from the regulation involved. The defendant may not, however, raise any defense addressed to the validity of the regulation.

It is evident, we submit, that the court below was correct in its conclusion that the "blanket" statutory language vesting in the statutory review forum "exclusive jurisdiction to determine the validity of any regulation," and depriving all other courts of "jurisdiction or power to consider the validity of any such regulation," plainly comprehends a broader subject matter than a ban against suits initiated by aggrieved persons to enjoin or set aside price controls; the language cited operates to bar consideration of the validity of a particular regulation "however the litigation may originate." As the court below also recognized, the legislative history confirms this construction (No. 375, R. 75–76). Petitioners' contention that Section 204 (d) is not to be construed as barring an attack on the Regulation in this suit is plainly in error.[5] The suggestion that

[5] It is true that, in an analytical sense, it may be difficult to dissociate an attack, or a decision, directed at the validity of the statute from one directed at the validity of a regulation; since the statute impinges on the party involved through the regulation. Nevertheless the distinction has been drawn by Congress, and it is practicable to give it effect. (Cf. *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282.) The Senate Com-

the Regulation was not "issued under" Section 2 of the Price Control Act (Brief in No. 375, p. 3) is answered not only by the recital in the Regulation that it was issued under both that Act and the Act of October 2, 1942, but also by the provision in Section 7 (b) of the October 2 Act making applicable the provisions of the earlier Act where authority is delegated to the Administrator by the President, as was done here (see Executive Order 9250, 7 Fed. Reg. 7871).

The statute and procedural regulations which have been issued pursuant to it (Revised Proce-

---

mittee on Banking and Currency, in favorably reporting the bill which contained the provisions of Section 204 (d), stated (S. Rep. 931, 77th Cong., 2d sess., p. 25):

"* * * Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. *'Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself.*" [Italics supplied.]

The bill thus reported to the Senate, whose pertinent provisions were adopted, differed significantly from the bill as introduced in the House; in its original form Section 204 (d) provided: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any ceiling regulation or order, *and of the provisions of this Act authorizing such regulation or order.*" [Italics supplied.] H. R. 5479, 77th Cong., 1st sess., printed in Hearings before Committee on Banking and Currency, House of Rep., 77th Cong., 2d sess., on H. R. 5479, pp. 4, 7–8. See also the decision of the three-judge Federal

566854—44——4

dural Regulation No. 1)[6] afford to aggrieved persons full opportunities for administrative and judi-

District Court in *Lockerty* v. *Phillips*, 49 F. Supp. 513, affd., 319 U. S. 182, where Circuit Judge Maris (a member of the bench of the Emergency Court of Appeals) stated for the court (p. 514):

"The portion of section 204 (d) which we are considering deprives the courts of the country, other than the Emergency Court of Appeals, merely of jurisdiction and power to 'stay, enjoin, or set aside * * *.' These words refer to the type of affirmative relief sought to be obtained from a court, the type being injunctive in its nature; they do not indicate or imply that a court may not consider the constitutionality of the act if that question arises incidentally in a criminal prosecution or civil suit. For example, we think it is clear that in a criminal prosecution or in a civil suit brought by the Price Administrator for an injunction to restrain a violation of the act or of a regulation issued thereunder section 204 (d) does not deprive the court of power to consider a defense based upon the alleged [un]constitutionality of the act. When Congress desired to prohibit courts from considering the question of validity under any circumstances it knew how to do so by the use of appropriate language for in the very sentence which we are considering it deprives all courts except the Emergency Court of Appeals of power 'to consider the validity of any such regulation, order, or price schedule' but it does not here or elsewhere in terms prohibit the courts from considering the validity of the act itself."

[6] The Price Control Act (Sec. 2 (c)) authorizes the Administrator to incorporate into maximum price regulations provisions "for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of the Act." (Cf. *Lakemore Company* v. *Brown*, 137 F. (2d) 355 (E. C. A., 1943); *Hillcrest Terrace Corporation* v. *Brown*, 137 F. (2d) 663 (E. C. A., 1943); *Armour and Co.* v. *Brown*, E. C. A., Aug. 6, 1943, OPA Service 610: 59.) While Revised Maximum Price Regulation 169 does not contain a general provision for individual adjustments, section 1364.410 provides for petitions for amendment, and in fact amendments have been made from time to time. See, *e. g.*, note 1, p. 4, *supra*.

cial relief.[7] Under Revised Procedural Regulation No. 1 two types of administrative relief were available to petitioners herein: (1) a "protest" against Maximum Price Regulation No. 169 or any provision thereof (Act, Sec. 203; Proced. Reg., Subpart D); and, (2) a "petition for amendment" of the Regulation or any provision thereof (Proced. Reg., Subpart C), the latter being an additional remedy afforded by the Administrator and not required by the Act addressed to the Administrator's "legislative" discretion. (See *Bogart Packing Co., Inc.*, v. *Brown*, E. C. A., Oct. 19, 1943, OPA Service 610:84.)

The statutory "protest" is required to be filed within sixty days from the date of issuance of the aggrieving regulation or may be filed upon "new

[7] The contention that preissuance hearings are constitutionally required is answered by many cases dealing with administrative rule-making affecting a large group, where practical considerations and the inherent guaranty of fairness in such general action are decisive; see *Bi-Metallic Co.* v. *Colorado*, 239 U. S. 441. In emergency situations the answer is especially strong. See *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Phillips* v. *Commissioner*, 283 U. S. 589, 595. In *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, the statute required preissuance hearings, and unless such hearings were held there would have been no opportunity for a hearing, since the record on review was limited to the record made before the Administrator. The Emergency Court of Appeals has sustained the procedure in respect of hearings. *Avant* v. *Bowles*, No. 63, decided December 31, 1943. It may be observed that Revised Procedural Regulation No. 1 makes provision for preissuance hearings in suitable cases (Secs. 1300.3–1300.5).

grounds" within sixty days from the date when the protestant had or might reasonably have had notice of such new grounds (Act, Sec. 203 (a); Proced. Reg., Sec. 1300.26). Petitioners complain that this limitation period affords inadequate time. The Act specifically provides that the Administrator may permit the presentation of evidence after the filing date (Sec. 203 (a)). Revised Procedural Regulation No. 1 contains detailed provisions in aid of protestants so circumstanced that they require additional time for presentation of evidence (Secs. 1300.30 (c), 1300.33 (b)). A sixty-day limitation period is more than a reasonable time in which to decide upon entry into an administrative forum. In *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 153, this Court held forty days to be ample notice of a hearing for establishment of minimum wages under the Fair Labor Standards Act. The Court has held much shorter periods to be reasonable (*Wick* v. *Chelan Elec. Co.*, 280 U. S. 108 (18 days between first day of publication and return in condemnation); *Bellingham Bay, etc., Co.* v. *New Whatcom*, 172 U. S. 314 (10 days within which to file objection to notice of reassessment) cf. *Campbell* v. *Olney*, 262 U. S. 352 (20 days within which to sue to set aside assessment)). The Congressional adoption of a sixty-day, rather than a longer, period for protest is fully justified under the present circumstances.

These wartime regulations and orders affect millions of persons. It is of the utmost importance that necessary or desirable changes be brought to the Administrator's attention with the greatest possible dispatch. It would be difficult to justify a longer period (*Harlem Metal Corp.* v. *Brown,* 136 F. (2d) 242 (E. C. A. 1943); *Bogart Packing Co., Inc.* v. *Brown,* E. C. A. Oct. 19, 1943, OPA Service 610:84; *Taylor* v. *Brown,* 137 F. (2d) 654 (E. C. A. 1943), certiorari denied, No. 305, present Term.

In passing upon protests the Administrator is governed by the provisions of Section 203 of the Act. He is required to dispose of protests with reasonable dispatch; he is subject in this regard to corrective order by writ of mandamus from the Emergency Court of Appeals (*Safeway Stores, Inc.* v. *Brown,* 138 F. (2d) 278 (E. C. A. 1943)). Protestants may file documentary matter, and the implementing procedural regulation makes full provision for oral hearings (Secs. 1300.39–1300.42) and for the issuance of subpoenas at a protestant's request in proper cases (Sec. 1300.44). The Administrator must advise the protestant of the grounds upon which denial of a protest is based, and of any economic data and other facts of which he has taken official notice (Act, sec. 203 (a)).

The jurisdiction of the Emergency Court of Appeals attaches upon the filing of a complaint

in that court. The statute requires (Sec. 204 (a)) that in preparing the transcript for the Emergency Court the Administrator shall include such matter as is "material under the complaint." It is the complainant, therefore, who controls and shapes the issues in the Emergency Court. The provision (Sec. 204 (a)) that facts of which the Administrator has taken official notice shall be included in the transcript "so far as practicable" is not a peril to the complainant. Rule 15 (d) of the Emergency Court of Appeals specifically provides for "correction of the transcript." The complainant is in a position to decide advisedly whether to invoke this rule since he will have been informed by the Administrator of the data on which the order of denial is based (p. 20, *supra*). These safeguards, together with the provisions respecting introduction of new evidence in the Emergency Court of Appeals (Act, Sec. 204 (a)), ensure that persons entering the statutory forum will receive full opportunity for apprisal and rebuttal at all stages of the review process.[8]

[8] With respect to oral hearings, the statute permits, but does not require, the Administrator to limit protest proceedings to the filing of affidavits, or other written evidence, and the filing of briefs. Revised Procedural Regulation No. 1 (Sec. 1300.39 *et seq.*) provides for the granting of oral hearings where the protestant shows that "affidavits or other written evidence and briefs will not permit the fair and expeditious disposition of the protest." In view of the nature of the issues, written evidence, with apprisal of any countervailing

This Court has already had occasion to observe the practical operation of the statutory review procedure (E. g., *Davies Warehouse Co.* v. *Brown*, 137 F. (2d) 201 (E. C. A. 1943), certiorari granted, No. 112, present Term; *Taylor* v. *Brown*, 137 F. (2d) 654 (E. C. A. 1943), certiorari denied, No. 305, present Term). The Emergency Court of Appeals is endowed by the statute with powers sufficiently broad to assure aggrieved persons of the fullest judicial consideration and the fullest opportunity for judicial relief (*Taylor* v. *Brown, supra; Wilson* v. *Brown*, 137 F. (2d) 348 (E. C. A. 1943); *Armour and Co.* v. *Brown*, E. C. A., August 6, 1943, OPA Serv. 610:59; *Hillcrest Terrace Corporation* v. *Brown*, 137 F. (2d) 663 (E. C. A. 1943)). The Emergency Court possesses authority to set aside any regulation which is shown to be "not in accordance with law, or * * * arbitrary or capricious" (Section 204 (b)). It also possesses power, of course, to pass upon any proper challenge to the constitutionality of the Act itself. (See p. 16, *supra*.) And it may exercise its corrective powers to prevent procedural abuses by the Administrator or to remand for correction. (See *Safeway*

---

data and an opportunity to rebut it, will ordinarily be adequate. Administrative proceedings confined to written evidence and briefs are familiar practice. (See Report of Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st sess., pp. 404–410; *United States* v. *Abilene & So. Ry.*, 265 U. S. 274, 289.)

Stores, Inc. v. *Brown, supra;* Act, Sec. 204 (b).) The Emergency Court of Appeals exercises the judicial power of the United States in reviewing the Administrator's determinations. Except for the restrictions as to issuance of interlocutory orders, it exercises the full powers of a district court of the United States, with respect to the jurisdiction conferred by the Act (Section 204 (c)). The plan of administrative and judicial review established in Sections 203 and 204 of the Act has been held, in its various aspects, to satisfy the requirements of due process. (E. g., *Lockerty* v. *Phillips,* 319 U. S. 182; *Avant* v. *Bowles,* E. C. A. Dec. 31, 1943, not yet reported; *Taylor* v. *Brown, supra; Montgomery Ward & Co.* v. *Bowles,* E. C. A., November 5, 1943, OPA Serv. 610:87; *Lakemore Company* v. *Brown,* 137 F. (2d) 355 (E. C. A. 1943); *Henderson* v. *Kimmel,* 47 F. Supp. 635 (D. Kan. 1942)).

Directly in issue in the present case is the provision of Section 204 (d) forbidding any court outside the exclusive statutory forum to consider the validity of maximum price regulations. This provision operates in protective combination with the jurisdictional restriction (Sec. 204 (d)) sustained in *Lockerty* v. *Phillips, supra,* and with the provisions which bar interlocutory relief in the Emergency Court of Appeals (Sec. 204 (c)) and preserve the regulations in force pending review by this Court (Section 204 (b)). These provisions are parts of a unified statutory plan.

They are designed to safeguard the nation against the perils which inhere in delay, premature interruption, or nonuniform application of inflation controls in wartime. Before considering the precedents which support their validity, we shall recount briefly the considerations which impelled their enactment and which demonstrate their function in the control of wartime inflation.

The need for continuity of control.—There will be no challenge, we are confident, of the judgment embodied in the Emergency Price Control Act that effective control of price inflation is a matter of the most urgent necessity for a nation at war today.[9] Effective control is difficult in part because the incidents of price inflation are as manifold and as widespread as the business transactions which take place each day in the economic life of a large industrial nation. The chief difficulty arises, however, from the cumulative and irremediable character of price inflation. An inflationary incident is virtually impossible to undo, because its consequences are rapid and pervasive. The only effective way to control inflation with respect to particular commodities is to control it uniformly, without delay, and without interruption.

If adverse adjudications—preliminary or final injunctions or other paralyzing orders—interfer-

[9] See Message of the President, July 30, 1941, 87 Cong. Rec. 6457, H. Rept. 1409, 77th Cong., 1st Sess.

ing with the present controls could be secured in various judicial districts throughout the country, and if premature relief could be secured in the statutory forum, the purposes of the Emergency Price Control Act would be nullified. In the case of criminal proceedings, any opportunity for appeal by the Government would depend on whether the adverse decision of the trial court fell within the categories covered by the Criminal Appeals Act (18 U. S. C. § 682). Persons or localities benefiting by such adjudications in the regularly established courts of the country would be freed from the obligation to comply with regulations while others still had to obey. Such inequality in the operation of the statute would naturally create a sense of injustice in the community, would militate against popular acceptance of the statute, and would make its proper enforcement more difficult. More than this, however, such uneven and haphazard operation of the statute would carry a threat of serious damage to the domestic economy. The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the areas in which higher prices prevailed. Purchasers in lower-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would

be the more acute because of wartime shortages in many commodities.

Similarly, premature orders in the statutory forum itself, suspending the effectiveness of regulations throughout the country in advance of a final decision on their validity, would defeat expeditious and fair methods of regulation. If a price regulation did not have to be obeyed during the period between its original promulgation and final judicial determination of its validity, many persons would find it more profitable to make the fullest use of the law's delays rather than to take advantage of the opportunities provided by the statute for a speedy decision. The consequences of any prolonged suspension of regulations might be disastrous and would be irrevocable.

It is evident, then, that control of price inflation in wartime, perhaps unlike other kinds of governmental regulatory action, cannot accomplish its purpose unless it is effective from the very outset and continues to be effective while normal administrative remedies are being applied and the fullest judicial consideration of the program is being completed. No bond or deposit in court could safeguard the incalculable values both public and private which are at stake when inflationary controls are challenged in wartime. No price can be placed upon military need and national morale. Congress recognized in this Act that the national safety demands continuity of

price control until, in pursuance of an orderly course of proceedings, the decision of the highest court of the land has been had upon the questions of law involved.

The need for a simplified enforcement mechanism and for expert review.—The need for simplified enforcement in aid of wartime price controls is apparent. Maximum price regulations affect millions of persons. Unless effective enforcement measures are available, a price-control program cannot long proceed successfully. If, in every suit to enforce compliance with the regulations, the Government were under an obligation to present the mass of economic data which might be required to establish the validity of the regulation, and to meet the evidence and arguments which might be presented by each defendant, the already great difficulties of enforcement might well become insuperable. Congress in adopting the review provisions of this Act had before it the discouraging history of delay in the litigation of public utility rate cases. (See Mr. Justice Brandeis, concurring, in *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, at 84–88; Mr. Justice Black, dissenting, in *McCart* v. *Indianapolis Water Co.,* 302 U. S. 419, 435–436.) The technical and complex economic questions involved in challenges to the validity of price regulations have accordingly been reserved by Congress for consideration in

orderly proceedings before a specially constituted tribunal which can act on a proper administrative record, can develop the essential expertise for a fair, well advised, and expeditious appraisal of the regulations, and can build up the necessary uniformity in standards of review. The Emergency Court of Appeals thus enjoys the advantage of a continuous and concentrated experience in disposing of these important controversies. It can render its decisions upon a comprehensively informed basis and with proper recognition of national aspects.

The need for administrative flexibility.—Thousands of persons are often affected by the establishment of a single price ceiling. Careful investigation prior to the issuance of a regulation will have brought the general economic considerations to the attention of the Administrator. No amount of preliminary economic survey, however, can bring to the attention of the Administrator all of the significant facts in the situation and all of the ways in which the regulation will affect the persons subject to it. The unique problems of particular business units can only be known if they bring their cases to the attention of the Administrator and advise him of the facts. Often there is no occasion for controversy between persons subject to a regulation and the Administrator, but merely the need for an opportunity to present significant and relevant facts to the Ad-

ministrator. Precision in adjustment or modification of a regulation is only possible within the framework of the administrative processes. The agency which establishes the regulation is in the best position to make a thorough and complete reexamination of the considerations which led to the issuance of the regulation in its original form.

In contrast with the flexibility of the administrative remedy is initial judicial determination of the validity of a maximum price regulation. A court in passing upon the validity of a particular regulation would be limited to a finding that it is either valid or invalid. It could not make the adjustments or modifications appropriate for a particular case. If a maximum price of twenty-four dollars per cwt. is judicially determined to be invalid, the result would not be that a maximum of twenty-five dollars would be substituted; the seller would be free to sell at any price the traffic would bear. Instead of flexible but secure control of prices the result would be absolute release of control for a period.

That the considerations outlined above dictated the adoption of these provisions by Congress is amply shown by the legislative history of the provisions, as set forth in the accompanying footnote.[10]

[10] The following excerpts are from the report of the Senate Banking and Currency Committee, recommending adoption

The instant suit illustrates the needs which Congress had in view when it passed this Act. Established metropolitan wholesale dealers in meat, a food not less scarce than vital in the

---

of the provisions (77th Cong., 2d Sess., S. Rep. No. 931, pp. 23, 24-25):

"* * * In keeping with the emergency character of the regulations and orders of the Administrator issued under section 2 of the bill, and to expedite action affecting the validity of such regulations or orders without overburdening the regular courts and judges, exclusive jurisdiction to determine the validity of any such regulation or order is vested in an Emergency Court of Appeals created under Section 204 (c) of the bill, and upon review of judgments or orders of such Emergency Court, in the Supreme Court of the United States. * * *

"The Emergency Court of Appeals is given exclusive jurisdiction to set aside, in whole or in part, any regulation or order under section 2, to dismiss the complaint, or to remand the proceedings, and all the powers of a district court are conferred upon it with respect to this jurisdiction, except the power to issue interlocutory orders staying the effectiveness of any such regulation or order.

* * * * *

"The bill contains provisions necessary to insure that price control administration will not be paralyzed by preliminary injunctions, interlocutory restraining orders, or stays. The Emergency Court of Appeals and the Supreme Court upon review of judgments and orders of the Emergency Court, are granted exclusive jurisdiction under section 204 (d) to determine the validity of any regulation or order issued under section 2 or of any price schedule effective under the provisions of section 206. If the judgment of the Emergency Court is to enjoin or set aside, in whole or in part, any such regulation or order, the effectiveness of such judgment is postponed under section 204 (b) until after 30 days from the entry thereof. This 30-day period is necessary in order to prevent

present emergency, are dissatisfied with the maximum price regulation applicable to their business. Under the statute methods are provided whereby these objections could be disposed of in an orderly manner without violent dislocations—without subjecting the public to the hardships of a reduced supply of meat or excessive meat prices, and without involving the dissatisfied meat dealers in prosecutions for breaking the law. The dealers, however, have not pursued their statutory remedy and have invited criminal prosecutions by violat-

prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

"Section 204 (d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceedings are brought have jurisdiction,

ing the price regulation.[11] Finally, they have attempted to thwart these prosecutions by invoking a forbidden judicial authority below to have the entire meat regulation declared invalid. Thus, petitioners, having chosen to forego their statutory remedy, now ask that this Court order the trial court and the Government to undertake a task which could be terminated with reasonable

---

concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

The following excerpt from the hearings on the bill is also pertinent:

"Mr. GINSBURG. The bill [as originally passed by the House] further omits provisions with regard to a stay. In our bill—and I believe in the bill proposed by Senator Taft—the price remains in effect while it is being reviewed by the courts. The idea is that if the price could be stayed while it is being reviewed by the courts, there would be no possibility of price control in the interval.

"The House bill omits the stay provision. It permits diversity of decision and review by 11 different courts. In some circuits the price could go up because the price fixed by the Administrator or the Board is no longer in effect; in other circuits, where there have not been any appeals, the price would remain fixed.

"Senator TAFT. There should be no stays" (Hearings before the Committee on Banking and Currency, Senate, 77th Cong., 1st Sess., H. R. 5990, pp. 146, 147).

[11] The initial statutory 60-day period provided in section 203 (a) for filing of protests against Revised Maximum Price Regulation No. 169 (7 F. R. 10381), expired on February 8, 1943. The indictments against petitioners were handed down on February 24, 1943. Petitioners have not attempted to file protests on new grounds arising after the initial 60-day period, as they are entitled to do under section 203 (a) upon a proper showing that such new grounds have in fact arisen. (See p. 19, *supra*.)

promptness only at the expense of thoroughness and accuracy, which could be performed with even so much as a minimum regard for the complex problems involved only at the expense of expeditious and efficient enforcement, and which in no event would be aided by the necessary underlying administrative record.

If the events described should establish a model for other persons subject to maximum price regulations the price control program would collapse. The provisions of the Act which provide for exclusive jurisdiction and prevent the issuance of premature stays are intended to avert this danger and at the same time afford to aggrieved persons an appropriate avenue of relief.

B. THE PROVISION WHICH BARS CONSIDERATION OF THE VALIDITY OF MAXIMUM PRICE REGULATIONS IN SUITS TO ENFORCE THE ACT AND GRANTS EXCLUSIVE AUTHORITY IN THAT REGARD TO THE EMERGENCY COURT OF APPEALS IS CONSTITUTIONAL

We have previously shown (pp. 23–32, *supra*) that a restriction against consideration of the validity of the regulations had to be imposed in proceedings to enforce the regulations as a necessary corollary of the grant of exclusive jurisdiction to the Emergency Court of Appeals and this Court. This provision of Section 204 (d), like the bar against injunctions in the district courts, is designed to ensure that the exclusive purview reserved to the statutory forum will not be infringed by other courts. The pro-

vision constitutes a recognition by Congress of the need for uniform application and proper enforcement of wartime price controls. The provision fulfills this need, as has been seen, by ensuring well-advised judicial consideration, uniformity of judgment, and due reliance on a proper administrative record, in determining the complex questions presented by a challenge to a price regulation; and by ensuring that persons who disregard the statutory opportunities for review will not be permitted to convert prosecutions for violation of price ceilings into controversies resembling peacetime rate litigation.

Thus, the statutory ban against inquiry respecting the validity of regulations in enforcement suits is an integral part of a statutory plan adopted in furtherance of vital wartime objectives. This provision of the Act rests, therefore, like the other features of the exclusive review plan attacked by petitioners, primarily on the war powers of Congress. In exercising these powers for the control of prices in wartime, the choice of measures and procedures to make that control effective is a necessary part of the Congressional authority. The war power of the Federal Government "is a power to wage war successfully" (*Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 426; see also *Stewart* v. *Kahn*, 11 Wall. 493, 506; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 163).

The constitutionality of the provision forbidding consideration of the validity of price regulations in enforcement suits is fortified by established principles of administrative law. Even in the absence of section 204 (d) petitioners would probably not have the right to challenge the regulation in the proceedings below. Petitioners would be prevented from challenging the regulation as a normal consequence of their failure to exhaust their administrative remedies. In specifically compelling the same result, therefore, the Act has not deprived petitioners of any rights they might otherwise have had. And certainly they have not been denied due process of law. The numerous generalizations quoted by petitioners (Brief in No. 375, pp. 35–39) to the effect that the validity of official action may be challenged by way of defense, deal with situations where other recourse was not available; they do not reach the issue presented here.

Any objection against the validity of the regulation is available if raised in the appropriate manner and at the proper time. The essential purpose of the rule requiring exhaustion of administrative remedies before resort to the courts—which Mr. Justice Brandeis described in *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, as a "rule of judicial administration"—is to allow the administrative body which promulgated the regulation an opportunity to consider ob-

jections to it and if necessary modify it upon full consideration of the relevant facts, accommodating the relief to the needs of the particular case. That rule, together with the rule preventing collateral attack upon administrative determinations, makes an administrative enactment unassailable in proceedings instituted to enforce it.

Thus, in *Bradley* v. *City of Richmond*, 227 U. S. 477, a defendant in a criminal prosecution for violation of an ordinance requiring private bankers to obtain licenses was held barred from challenging his administrative classification because of his failure to appear before the classifying agency. No statute required the Court to refrain from considering the validity of the administrative action; yet the Court ruled that, because the procedure established by the statute which might have afforded relief was not pursued, invalidity even on constitutional grounds could not be urged as a defense in a criminal proceeding. This Court said (p. 485):

> The plaintiff in error might have appeared and shown the character and extent of the business he was doing and compared it with that of others more favored in classification. He did nothing of the kind. He seems to have stood by and let the matter of classification go by without contest. It is no answer to say that it would have been unavailing. The presumption is otherwise. The authority to classify was

committed primarily to the finance committee, subject to review by the council. It was expected to use its judgment and knowledge. If it erred there was ample opportunity to show that by an appeal to the council. Of the right to appear and to be heard plaintiff in error elected not to avail himself. Under these circumstances he is not warranted in resorting to the extraordinary jurisdiction of this court to arrest an administrative error susceptible of correction by an appeal to the council. * * *

In *United States* v. *Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y. 1908) the court upheld the constitutionality of the Elkins Act (Act of Feb. 19, 1903, c. 708, sec. 1, 32 Stat. 847, 49 U. S. C. 41), which was construed to deprive a shipper of the right to contest the reasonableness of the carrier's filed rate in defending against a criminal prosecution for receiving rebates.[12] The shipper was

[12] The court said (p. 540):

"* * * That Congress had power under the commerce clause of the Constitution to regulate commerce is conceded, and its purpose in enacting the statute forbidding unjust discrimination and preference to the end that all shippers shall secure unform treatment is beyond question. How this object and purpose of Congress can be effectuated if a shipper receiving rebate, concession, or discrimination is permitted to question or litigate the legality of the rate as to its reasonableness or unreasonableness in a criminal prosecution charging him with having received a concession is difficult to understand. Indeed such a construction of the act would nullify its general scope, and render its strict enforcement wholly impracticable, for juries and judges in different

bound to obey the filed rate until set aside by the Commission as unlawful, though he had not set the rate and insisted it was unreasonable. The same statute was involved in *Lehigh Valley R. Co.* v. *United States*, 188 Fed. 879 (C. C. A. 3d, 1911), a criminal prosecution for improperly cancelling demurrage charges. The defense that the demurrage rates set up by the Interstate Commerce Commission were discriminatory was held unavailable in a criminal prosecution, since the validity of the rate could be questioned only in an administrative proceeding before the Commission. These cases are sought to be distinguished by petitioner (Brief in No. 375, p. 57) on the ground that the Interstate Commerce Commission is an older agency than the Office of Price Administration—a distinction which, all else aside, is hardly of constitutional stature.

The similar situation in cases under the Selective Service Act—holding that in a prosecution for failure to report for induction the defendant may not litigate the alleged arbitrariness or invalidity of his classification as determined by the Local Board—has been presented

---

jurisdictions would not be likely to reach a conclusion upon the subject of just or unjust tariff charges which would secure uniformity of rates. It is therefore clear that there can be no departure or deviation from the established rates except in the manner provided by the act, and such rate must be regarded as binding upon the shipper * * *."

to the Court in *Falbo* v. *United States*, No. 73, present Term.

The rule thus forbidding collateral attack on administrative orders in criminal proceedings has, of course, likewise been applied in other types of enforcement suits. The principle requiring exhaustion of administrative remedies has equally compelling force in both civil and criminal suits. Only the method outlined in the statute for testing the validity of an administrative order may be used. Unless and until the order has been set aside in direct proceedings to challenge it, it must be observed and compliance will be enforced. This result is reached although no statute expressly commands it, and a statute which does command it is undoubtedly constitutional (*American Bond & Mortgage Co.* v. *United States*, 52 F. (2d) 318 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374; *United States* v. *Piuma*, 40 F. Supp. 119 (S. D. Cal. 1941), affirmed, 126 F. (2d) 601 (C. C. A. 9th, 1942); *Interstate Commerce Commission* v. *Consolidated Freightways*, 41 F. Supp. 651 (D. N. D. 1941). Cf. *Ingraham* v. *Union Stock Yards Co.*, 64 F. (2d) 390 (C. C. A. 8th, 1933); *Forbes* v. *United States*, 125 F. (2d) 404 (C. C. A. 9th, 1942); *United States* v. *R. L. Dixon and Bro.*, 36 F. Supp. 147 (N. D. Tex. 1940); *United States* v. *Hawthorne*, 31 F. Supp. 827 (N. D. Tex. 1940), affirmed on other grounds, 115 F. (2d) 805 (C. C. A. 5th, 1940); *Harris* v. *Cen-*

tral Nebraska Public Power & Irr. Dist., 29 F. Supp. 425 (D. Neb. 1938)).[18]

This Court has declared that where rates have been established by an administrative agency, they may be challenged only in the manner prescribed by statute and that other courts may not prevent the agency from prosecuting violators (*United States* v. *Corrick*, 298 U. S. 435). In that case operators of market agencies sought to file higher rates than those prescribed by the Secretary of Agriculture for market services under the Packers and Stockyards Act of 1921, 7 U. S. C., secs. 181–229, and to restrain the Secretary from prosecuting them for charging the higher rates. Dismissing the bill, this Court said (p. 440):

> The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees, and these had not been set aside or enjoined in any appropriate judicial proceeding or been altered by subsequent order of the Secre-

[18] To the same effect are numerous State court decisions. *Town of Pittsfield* v. *Town of Exeter*, 69 N. H. 336, 41 Atl. 82 (1898); *Town of Rockingham* v. *Hood ex rel. Bank of Pee Dee*, 204 N. C. 618, 169 S. E. 191 (1933); *Fitt* v. *Central Illinois Public Service Co.*, 273 Ill. 617, 113 N. E. 155 (1916); *Friedman Mfg. Co.* v. *Industrial Commission*, 284 Ill. 554, 120 N. E. 460 (1918); *St. Louis Pressed Steel Co.* v. *Schorr*, 303 Ill. 476, 135 N. E. 766 (1922); *People ex rel. Brittain* v. *Outwater*, 360 Ill. 321, 196 N. E. 835 (1935); *People ex rel. McDonough* v. *Beemsterboer*, 356 Ill. 432, 190 N. E. 920 (1934), certiorari denied, 293 U. S. 575; rehearing denied, 293 U. S. 630.

tary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

It is recognized in the foregoing cases that, where the statutory review procedure has not been pursued, a defense based upon the alleged invalidity of administrative action is as inadmissible as the institution of a suit to enjoin enforcement. (Cf. *Lockerly v. Phillips*, 319 U. S. 182.) See the cases upholding Section 204 (d) in enforcement suits, cited in our Memorandum on petition for certiorari in No. 375, at p. 6.

Petitioners in choosing to disregard the available statutory methods of review and to subject themselves to criminal prosecution by violating the regulation have made that choice knowing in advance that they would not be permitted to challenge the violated regulation in the criminal suits. Congress has accorded to petitioners ready access to a proper forum in which all objections to a regulation may be presented and fully considered. Their right to challenge an allegedly invalid regulation has not been abridged. The only restrictions placed on their rights in this respect are (1) the customary requirement, enforced by the courts themselves even in the absence of statute, that objections to any administrative order first be brought to the attention of the administrative agency; (2) the requirement, traditionally ob-

served under statutes of this type, that where a statutory judicial forum is provided and designated as exclusive, objections to an administrative order shall be presented in such forum; and (3) the indispensable wartime enforcement of obedience to price controls pending completion of review proceedings (see pp. 13–16, 23–32, *supra*, 42–60, *infra*).

There is no merit in petitioners' contention that the Act violates their right under the Sixth Amendment to a jury trial. The issue of the validity of the regulation need not be settled by jury trial. (Cf. *Block* v. *Hirsh*, 256 U. S. 135, 158.) This Act does not trench upon any right guaranteed to petitioners by the Sixth Amendment.[14]

Finally, it is submitted that the considerations and authorities presented above are sufficient to dispose of petitioners' contention that the provision barring consideration of the validity of regulations in enforcement suits is an unlawful abridgment of the judicial power.[15]

---

[14] It may be observed that if the objection is addressed to the need to come to Washington to appear before the Emergency Court of Appeals, the rules of that Court specifically provide that it may sit anywhere. Rule 4 (a), Rules of the United States Emergency Court of Appeals.

[15] *United States* v. *Klein*, 13 Wall. 128, is not opposed. The statute there prescribed an arbitrary rule for the judicial determination of a question of fact, and in addition it thwarted the executive power of pardon.

C. THE PROVISIONS WHICH PROHIBIT STAYS AND INTERLOCUTORY INJUNCTIVE ORDERS FOR THE PURPOSE OF MAINTAINING CONTINUITY OF PRICE CONTROL PENDING COMPLETION OF STATUTORY REVIEW PROCEEDINGS ARE CONSTITUTIONAL

In addition to complaining of the provision which channels attacks on the regulations in the exclusive statutory forum, petitioners complain of the accompanying provision denying stays in the statutory forum (sections 204 (b), 204 (c)). Attack is thus made upon the provisions of the Act which insure the continuity necessary for success of the present wartime price controls.

The provisions assailed are an indispensable part of a statute which rests on the war powers of Congress. We have pointed out above (see pages 23–32, *Supra*) that these provisions are essential because the principal difficulty in dealing effectively with wartime price inflation arises from its "runaway" or "spiral" character. Delayed or interrupted control is futile. The harm done to the public interest by a release of control could not be guarded against by any bond or deposit. Petitioners' assertion that they suffer loss under this statute cannot outweigh the overwhelming considerations on the side of the public. The validity of the denial of stays in this Act rests, then, primarily upon the war powers of Congress. Further, however, it is submitted (1) that petitioners cannot attack the stay provisions because

they have not been injured by them; and (2) that there is no constitutional right to a stay.

1. *Petitioners Have Not Been Injured by the Stay Provisions*

Petitioners have not been injured by the provisions of the statute which preserve the continuity of price regulations in the statutory forum, because they have not gone into the administrative forum provided in section 203 of the Act and in the implementing regulations. By applying for administrative reconsideration petitioners might have obtained complete relief in the form of a substantive order or amendment which would have been the equivalent of a stay. There would then have been no need for a judicial stay or for the present controversy on this point.

It is well established that persons may not challenge a statutory procedure which they have declined to pursue and whose untried incidents cannot properly form the subject of collateral inquiry or attack. (See the cases cited at p. 13, *supra*.) Before petitioners can complain that they are hurt by the provisions of the statute denying them judicial stays, they are under a duty to show that they have made an effort under the statutory procedure to obtain administrative relief which might have obviated the need for such a stay.

2. *A Stay is not a Matter of Absolute Right Under the Constitution*

As this Court recently had occasion to declare in *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, there is no absolute right to a stay pending judicial review of legislative or administrative enactments; the right to such a stay is never recognized where the public interest demands otherwise. The Court said (p. 10):

> A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant (*In re Haberman Manufacturing Co.*, 147 U. S. 525). It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case (*Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672–73; * * *).

The question before the Court in that case was whether Congress intended to authorize stays in a certain class of proceedings for judicial review of orders of the Federal Communications Commission. The statute was construed as authorizing stays. Neither the majority nor the dissenting opinion treated the question on any level save that of Congressional intention. In the case at bar the answer is not in doubt. This Court indicated the answer when, in the *Scripps-Howard* case, it adverted to the present Act and declared

that Congress "knew how to use apt words" (316 U. S. at 17) to express its command that the present wartime price controls shall remain immune against judicial stays.

The recognition in the *Scripps-Howard* case that stays are not a matter of absolute right and may be subject to Congressional control in the public interest is in accord with the well-established principle that the courts themselves do not permit stays in situations involving some object of paramount public concern. The rule traditionally followed in such cases is that the "balance of convenience" between the parties must condition the granting of a stay. Frequently granted in suits between private parties, stays even in that class of suits are not absolutely assured because the right is qualified by two conditions; first, it must appear that the rights of the party to be aided will suffer heavily if relief is denied; but, second, it must also appear that the rights of the party to be enjoined will not be seriously injured in the meantime or can be protected by the posting of financial security. That the first of these conditions is met is not enough; the second must also be met.[16]

[16] In the following private litigation relief was denied under this rule: *Kryptok Co.* v. *Stead Lens Co.*, 190 Fed. 767 (C. C. A. 8th, 1911); *Shubert* v. *Woodward*, 167 Fed. 47 (C. C. A. 8th, 1909); *Green* v. *Gravatt*, 19 F. Supp. 87 (W. D. Pa. 1937); *International Film Service Co.* v. *Associated Producers*, 273 Fed. 585 (S. D. N. Y. 1921); *DeKovcn* v. *Lake*

When a suit between private parties is one involving a matter seriously affecting the public interest,[17] and, *a fortiori,* when a governmental entity or agency is directly involved as a party in a suit, this rule achieves the status of a virtual bar against stays.[18] (See *Harrisonville* v. *Dickey Clay Co.,* 289 U. S. 334, 338.) If a stay is granted in such a suit against a public agency, it is strictly

---

Shore & M. S. Ry. Co., 216 Fed. 955 (S. D. N. Y. 1914); *Napier* v. *Westerhoff*, 138 Fed. 420 (C. C. S. D. N. Y. 1905); *Gring* v. *Chesapeake & Delaware Canal Co.*, 129 Fed. 996 (C. C. Del. 1904), affirmed, 159 Fed. 662 (C. C. A. 4th, 1908), certiorari denied, 212 U. S. 571; *Amelia Milling Co.* v. *Tennessee Coal, Iron & R. Co.*, 123 Fed. 811 (C. C. N. D. Ga. 1903); *Day* v. *Candee*, Fed. Cas. 3676 (C. C. Conn. 1853). In the following private cases relief was given under the rule: *Selchow & Righter Co.* v. *Western Printing & Lithographing Co.*, 112 F. (2d) 430 (C. C. A. 7th, 1940); *Phillips* v. *Sager*, 276 Fed. 625 (App. D. C. 1921); *Chew* v. *First Presbyterian Church of Wilmington, Del., Inc.*, 237 Fed. 219 (D. Del. 1916); *Colgate* v. *James T. White & Co.*, 169 Fed. 887 (C. C. S. D. N. Y. 1909); *Harriman* v. *Northern Securities Co.*, 132 Fed. 464 (C. C. N. J. 1904), reversed, 134 Fed. 331 (C. C. A. 3rd, 1905), affirmed, 197 U. S. 244; *Cohen* v. *Delavina*, 104 Fed. 946 (C. C. Maine 1900).

[17] *E. g., Stein* v. *Bienville Water Supply Co.*, 32 Fed. 876 (C. C. S. D. Ala. 1887), denying an injunction *pendente lite* as between private parties where the public water supply of a city was involved. The public interest was also a ground for denial of relief as between private parties in *Marconi Wireless Telegraph Co.* v. *Simon*, 227 Fed. 906 (S. D. N. Y. 1915). See *Gulf, M. & N. R. Co.* v. *Illinois Cent. R. Co.*, 21 F. Supp. 282 (W. D. Tenn. 1937).

[18] E. g., *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710; *Railroad Commission of Alabama* v. *Central of Georgia Ry. Co.*, 170 Fed. 225 (C. C. A. 5th, 1909),

conditioned upon the posting of a bond or other security to protect the public interest.[19] (Cf. *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43, 51.) If no bond is required it is because the subject matter is such that the court can exercise a preservative control over it *pendente lite*.[20] But when the case is one where the public interest is substantial and cannot be protected by bond or otherwise the courts are emphatic in rejecting petitions for interlocutory relief.

---

certiorari denied, 214 U. S. 521; *Pope* v. *Blanton*, 10 F. Supp. 18 (N. D. Fla. 1935); *Dryfoos* v. *Edwards*, 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264; *Hannah & Hogg* v. *Clyne*, 263 Fed. 599 (N. D. Ill. 1919); *F. W. Cook Brewing Co.* v. *Garber*, 168 Fed. 942 (C. C. M. D. Ala. 1909). *See* Hughes, *Federal Practice*, Sec. 1023; Nichols, *Cyclopedia of Federal Procedure*, Sec. 3210; McKean, *The Balance of Convenience Doctrine*, 39 Dickinson L. Rev. 211 (1935).

[19] *Magruder* v. *Belle Fourche Valley Water Users' Ass'n.*, 219 Fed. 72 (C. C. A. 8th, 1914); *Love* v. *Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321 (C. C. A. 8th, 1911), certiorari denied, 220 U. S. 618; *Menominee & Marinette Light & Traction Co.* v. *City of Menominee*, 11 F. Supp. 989 (W. D. Mich. 1935); *Birkheiser* v. *City of Los Angeles*, 11 F. Supp. 689 (S. D. Cal. 1935); *Joplin & P. Ry. Co.* v. *Public Service Commission of Missouri*, 267 Fed. 584 (W. D. Mo. 1919); *Contra Costa Water Co.* v. *City of Oakland*, 165 Fed. 518 (C. C. N. D. Cal. 1904); *San Joaquin & Kings River Canal & Irrigation Co.* v. *Stanislaus County*, 163 Fed. 567 (C. C. N. D. Cal. 1908); *Indianapolis Gas Co.* v. *City of Indianapolis*, 82 Fed. 245 (C. C. Ind. 1897). Cf. *United States* v. *Dominion Oil Co.*, 241 Fed. 425 (S. D. Cal. 1917). See *Pacific Live Stock Co.* v. *Lewis*, 241 U. S. 440.

[20] Cf. *In re Arkansas Railroad Rates*, 168 Fed. 720 (C. C. E. D. Ark. 1909); *Buffalo Gas Co.* v. *City of Buffalo*, 156 Fed. 370 (C. C. W. D. N. Y. 1907).

Thus, in *Tennessee Valley Authority* v. *Tennessee Electric Power Co.*, 90 F. (2d) 885 (C. C. A. 6th, 1937), certiorari denied, 301 U. S. 710, the circuit court of appeals reversed an order of the lower court entering an interlocutory injunction against the Tennessee Valley Authority. The court said (p. 894):

> Without denying that some injury may be suffered if the injunction is lifted, it does not so clearly appear that it will of necessity overbalance the injury which must inevitably be suffered by the defendants and the public.
>
> * * * To appraise the injury to the defendants from the disorganization which must follow substantial or even partial cessation of activity is impossible, but that it will be great cannot be denied. So also in respect to the public interest involved. The loss, inconvenience, and discomfort of the residents of the area in failing to obtain cheap electric energy, if it be found in the end that it may lawfully be supplied to them, may likewise not be measured, but equally incontrovertible is it that it will be great. Insofar, also, as restraint will delay effective control of the floodwaters of the Tennessee river and its tributaries, the public interest in the achievement of that objective is similarly beyond appraisal. Human experience of the catastrophic effect upon great areas of overflowing rivers is too recent and too painful to permit of any

> doubt either as to the existence or extent of the public interest that is threatened by the maintenance of the injunction, and against which the threat to private interests must be balanced. From such possible injury, it is clear no bond can adequately safeguard the public interest.

In *Dryfoos* v. *Edwards*, 284 Fed. 596 (S. D. N. Y. 1919), affirmed, 251 U. S. 146, 264, a temporary injunction against the World War Prohibition Act was refused. Judge Learned Hand said (p. 603):

> * * * The damage done by an injunction meanwhile cannot be measured in money, as in the case of *Cotting* v. *Kansas City Stockyards* (C. C.), 82 Fed. 857. Here is a question of national public policy, of allowing the sale of what the constituted authorities apparently regard as injurious to the public, or to so much of it as they have the right to consider. To annul their will, if only for a season, is to do an injury which is, to say the least, as irreparable, if the laws be valid, as to prevent the plaintiffs from selling intoxicants for the same period, if they are not * * *.

(Cf. *Petroleum Co.* v. *Public Service Comm'n*, 304 U. S. 209, 222–223.)

The observations of Mr. Justice Frankfurter, concurring, in *Mayo* v. *Canning Co.*, 309 U. S. 310, are applicable, *mutatis mutandis*, here. The company had sued in the federal district

court to enjoin enforcement of a Florida statute regulating the citrus fruit industry. This Court reversed the decree granting a temporary injunction. The concurring opinion emphasized the damage done to the public interest by the granting of the interlocutory decree (pp. 319–322):

> Citrus fruit occupies a central and indeed pervasive role in the economy of Florida. That state's well-being is dependent on the cultivation of the citrus crop, its packing, transportation, financing and exportation. * * * In *Nebbia* v. *New York*, 291 U. S. 502, this Court recognized price control as one of the means open to a state for the protection of its welfare * * *
>
> * * * * * *
>
> * * * [In this case] the [interlocutory] injunction effectively suspended the operation of the Florida law during the whole marketing season, although this Court now finds that the injunction should never have been granted.
>
> I do not believe we should now let this bill hang over next year's crop. We ought not to encourage the use of the judicial process for such unjustifiable attempts to set aside a state law by allowing them to be successful in result even though legally erroneous.

The law furnishes many examples of this preference in favor of the public interest. There are numerous situations in which there is imposed a

duty to obey first and litigate afterwards. The Selective Service Act is an outstanding example.[21]

The principle, however, finds its most frequent application in cases involving property rights. Mr. Justice Brandeis summarized it in *Phillips* v. *Commissioner*, 283 U. S. 589, 595: "Property rights must yield provisionally to governmental need." Relying on cases involving health measures and wartime controls, the opinion added (pp. 596–597):

> Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate (*Springer* v. *United States*, 102 U. S. 586, 593; *Scottish Union & National Ins. Co.* v. *Bowland*, 196 U. S. 611, 631). Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. For the protection of public health, a State may order the summary destruction of property by administrative authorities without antecedent notice or hearing (Compare *North American Cold Storage Co.* v. *Chicago*, 211 U. S. 306;

[21] Administrative appeals to the appeal boards and the President are the selectees' only remedy prior to induction since no judicial review is afforded them in advance. E. g., *Petition of Soberman*, 37 F. Supp. 522 (E. D. N. Y. 1941); *Shimola* v. *Local Board No. 42, for Cuyahoga County*, 40 F. Supp. 808 (N. D. Ohio 1941).

Hutchinson v. *Valdosta*, 227 U. S. 303; *Adams* v. *Milwaukee*, 228 U. S. 572, 584). Because of the public necessity, the property of citizens may be summarily seized in wartime (*Central Union Trust Co.* v. *Garvan*, 254 U. S. 554, 566; *Stoehr* v. *Wallace*, 255 U. S. 239, 245; *United States* v. *Pfitsch*, 256 U. S. 547, 553. Compare *Miller* v. *United States*, 11 Wall. 268, 296; *International Paper Co.* v. *United States*, 282 U. S. 399; *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481). And at any time, the United States may acquire property by eminent domain, without paying, or determining the amount of the compensation before the taking. (Compare *Kohl* v. *United States*, 91 U. S. 367, 375; *United States* v. *Jones*, 109 U. S. 513, 518; *Crozier* v. *Fried Krupp Aktiengesellschaft*, 224 U. S. 290, 306.)

Congress itself has prohibited stays or injunctive relief where the public interest was deemed sufficiently exigent. In the field of taxation, R. S. 3224 is essentially a provision of this sort. (See *State Railroad Tax Cases*, 92 U. S. 575, 613). An application of the balance of convenience rule was also made under the District of Columbia World War Rent Law (the "Ball Act").[22] In *Block* v.

[22] Section 110 of the Ball Rent Act, 41 Stat. 298 (1919), provided that rent determinations by the statutory commission should remain in full force and effect pending the final decision on appeal. This provision was applied in *Porter* v. *Gardner*, 277 Fed. 556 (App. D. C., 1922).

Hirsh, 256 U S. 135, rejecting the contention that a wartime rent control law allowing tenants to remain in possession at the existing rentals pending judicial review was unconstitutional, Mr. Justice Holmes, speaking for the Court, declared (pp. 157–158):

> The preference given to the tenant in possession is an almost necessary incident of the policy and is traditional in English law. If the tenant remained subject to the landlord's power to eviet, the attempt to limit the landlord's demands would fail.

A similar provision is found in the wartime National Prohibition Act of 1919, Sec. 9, 41 Stat. 312. The Act provided that upon judicial review of orders of the Commissioner of Internal Revenue revoking permits to deal in liquor for non-beverage purposes, the permit should remain revoked pending judicial review. The provision was upheld in *Cywan* v. *Blair*, 16 F. (2d) 279 (N. D. Ill., 1926); *Spartan Mfg. Co.* v. *Campbell*, 40 F. (2d) 745 (E. D. N. Y., 1930); *Rondinella* v. *Campbell*, 40 F. (2d) 746 (E. D. N. Y., 1930); *Triborough Chemical Corp.* v. *Doran*, 36 F. (2d) 496 (E. D. N. Y. 1929). See *Liscio* v. *Campbell*, 34 F. (2d) 646 (C. C. A. 2, 1929).

It is difficult to imagine a situation calling more strongly than the present one for the application of the rules limiting the right to a stay. It is plain where the "balance of convenience" lies.

No case of private inconvenience or even hardship can be allowed to avail to disorganize the operation, delicate and precarious enough at best, of the wartime price control program before a full and orderly review has been had. As was stated by the three-judge district court in *Henderson* v. *Kimmel*, 47 F. Supp. 635, 644–645 (D. Kan. 1942) cited with approval by the Emergency Court of Appeals in upholding the denial of stays, in *Taylor* v. *Brown*, 137 F. (2d) 654 (E. C. A. 1943), certiorari denied, No. 305, present Term:

> While the inhibition against the granting of the stay until a final decision by the Supreme Court deprives the courts of an historic power—a power as old as the judicial system of the nation, it is deprivation of jurisdiction essential to the successful operation of rent control for the reasons we have heretofore adverted to and is justified under the war power, to insure the safety of the nation and the perpetuation of our liberties. Moreover, a stay is not a matter of right, even if irreparable injury might otherwise result. It is an exercise of judicial discretion and the propriety of its issue ordinarily depends on the circumstances of each case. The considerations we have adverted to would warrant a court in denying a stay and in our judgment warranted the Congress in denying the power to grant the stay. Congress had

> the power to impose the duty to obey first and litigate afterwards.

Petitioners specifically complain of the provision of the present Act which requires that judgments of the Emergency Court of Appeals setting aside a regulation shall not become effective until 30 days have passed or until final disposition of the matter by the Supreme Court (section 204 (b)). The Senate Committee in favorably reporting this provision explained its purpose (77th Cong., 2d Sess., S. Rep. No. 931, p. 24):

> This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204 (d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court.

There is nothing unfamiliar about statutory postponement of the effectiveness of judgments pending review even when the decree is one for injunction. (Cf. *Federal Rules of Civil Procedure*, Rule 62, see especially subdivisions (*c*) and (*g*); 28 U. S. C., sections 350, 874). Moreover, it is not uncommon for final injunctions against a governmental entity to be stayed or postponed

for very long periods, even where no appeal is in view, on the ground that the public interest so requires. Thus, in *Wisconsin* v. *Illinois*, 278 U. S. 367, while an injunction was granted against a sanitary district restraining it from diverting water from the Great Lakes for sewage-disposal purposes, the decree was so framed as to allow sufficient time to the district to find some other means of disposal.

To the same effect are *Mayor and City Council of Baltimore* v. *Brack*, 3 Atl. (2d) 471 (Md., 1939); *Livezey* v. *Town of Bel Air*, 199 Atl. 838 (Md., 1938); *Board of Health of Ocean T'p* v. *White*, 110 Atl. 43 (N. J. Ct. of Errors and Appeals, 1919); *Simmons* v. *Paterson*, 60 N. J. Eq. 385, 45 Atl. 995 (1900); *Bogart* v. *Walker*, 248 N. Y. Supp. 19 (1931); *Spencenburgh* v. *City of Gloversville*, 87 N. Y. Supp. 602, 96 App. Div. 157 (1904); *Sammons* v. *City of Gloversville*, 70 N. Y. Supp. 284, 34 Misc. (N. Y.) 459 (1901). See 17 Va. L. Rev. 714–715 (1931).

Cases such as *Ex Parte Young*, 209 U. S. 123, and other cases involving public utilities,[23] which might be taken as indicating that a statute denying the right to a stay is unconstitutional, are not in point. The frequent practice of granting a stay in the public utility rate cases cannot furnish a

[23] E. g., *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104; *Mountain States Power Co.* v. *P. S. Commission of Montana*, 299 U. S. 167; *Pacific Tel. & Tel. Co.* v. *Kuykendall*, 265 U. S. 196; *Prendergast* v. *New York Tel. Co.*, 262 U. S. 43; *Oklahoma Gas Co.* v. *Russell*, 261 U. S. 290.

model for legislation such as the Emergency Price Control Act, where the bond or court deposit required in the rate cases would be unavailing. Moreover, the essential basis of the rule applied in the rate cases is that the compulsion upon a public utility to accept rates which may give an inadequate return and the sufficiency of which cannot be determined in advance of a protracted judicial investigation may result in a continuing "confiscation" of the utility's property, and ought not to be enforced by heavy cumulative penalties. These considerations are wholly inapplicable to the present Act.

First, the protection which is accorded to utilities against "confiscation" of their property cannot in all instances be given to persons subject to wartime price ceilings. Utilities are few in number, usually enjoy a monopolistic position, and ordinarily must continue to render their services to the public until permission to cease is given. The primary objective in these circumstances must be a balancing of consumer and company interests which will ensure the maintenance of the essential public services furnished by utilities. The standard of fair return fills the need for some basis in fixing proper rates for utility services. Under this Act, however, the considerations of public policy involved are wholly different. The primary objective of the Act is the prevention of inflation. Loss to some sellers is incidental to the accom-

plishment of this vital wartime purpose. *Wilson* v. *Brown,* 137 F. (2d) 348 (E. C. A., 1943.) The desirability of preventing such losses cannot be permitted to compromise or nullify the essential legislative objective. There is, accordingly, no place under this statute for the concept of fair return which gives rise to the problem of "confiscation" in public utility rate cases. The concept, appropriate though it may be in the public utility field, is derived by analogy from principles of eminent domain (see the concurring opinion in *Federal Power Commission* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 602–603, and the authorities there cited) and is wholly inappropriate to a wartime measure for control of inflationary prices. The "just compensation" clause of the Fifth Amendment does not limit Congress in legislating for the general interest to accomplish a general object of national policy under a regulatory statute. Property rights are held subject to proper legislative regulation and any resulting loss is merely consequential or incidental injury (*Omnia Commercial Co., Inc.,* v. *United States,* 261 U. S. 502; *Morrisdale Coal Co.* v. *United States,* 259 U. S. 188; *Block* v. *Hirsh,* 256 U. S. 135; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264).

Second, it would be incompatible with the functioning of the price control law to follow the practice of granting stays as in public utilities cases

during the necessarily protracted judicial hearings required for determination of the reasonableness of fixed rates. Speed is frequently the controlling consideration in the issuance of a price regulation. Protracted formal hearings, whether at the administrative or judicial stage, would postpone the effectiveness of regulations until a threatened price or rent increase had already materialized and had already worked its destruction in the familiar pattern of the inflationary spiral. It is noteworthy that, during the consideration of the various price-control bills, Congress, in addition to its recognition that judicial stays must be prevented (see note 10, pp. 29–31, *supra*), squarely rejected the proposition that formal administrative hearings be required before the issuance of price regulations. (See the Government's Brief, pp. 32–35, in *Bowles* v. *Willingham*, No. 464.) Congress recognized that the plan established for the issuance and review of price regulations must not be too cumbersome to meet emergency situations.

Third, the principle of decision applied in some public utility cases, and in other types of cases, to the effect that a stay is required as a protection against excessive or cumulative penalties, is not applicable to the present Act. The rule that penalties *pendente lite* are unconstitutional and ought to be stayed if they are so excessive as to deter resort to the courts was originally developed in cases where the only means of obtaining judicial review of a statute or an administrative order was

by committing a violation and awaiting prosecution (*Oklahoma Gin Co.* v. *Oklahoma*, 252 U. S. 339; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Ex parte Young*, 209 U. S. 123; *Federal Trade Commission* v. *Miller's Nat. Federation*, 23 F. (2d) 968 (App. D. C. 1927); *Allen* v. *Omaha Live Stock Commission Co.*, 275 Fed. 1 (C. C. A. 8th, 1921)). This condition does not obtain under the present Act, of course. Nor is the Act open to the objection that penalties are laid on the very exercise of the right of review, as in *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

It is submitted, therefore, that the stay provisions of this Act are a valid exercise of the war powers of Congress, and are fully supported by established principles of public law. These provisions are the most essential feature of the entire statutory plan of review and enforcement. They are indispensable for effective price control. Petitioners' constitutional rights are in no way abridged by these provisions.[24]

[24] *Porter* v. *Investors Syndicate*, 286 U. S. 461, affirmed on rehearing, 287 U. S. 346, contains a dictum to the effect that a statutory denial of a stay during review of an order revoking licenses under a state Blue Sky law would abridge constitutional rights. It is submitted that the considerations set forth in the preceding pages make the language of the *Porter* case inapplicable to this wartime statute. It may also be observed that in license suspension proceedings under this Act the Administrator is not empowered to suspend, but must apply for a judicial order of suspension which may, in turn, be stayed (Section 205 (f)).

II

THE EMERGENCY PRICE CONTROL ACT DOES NOT UNLAWFULLY DELEGATE AUTHORITY TO CONTROL PRICES TO THE ADMINISTRATOR

The question of delegation of power was not regarded by the court below as presenting any serious difficulty. The numerous federal and state decisions—including decisions by two other circuit courts of appeals, the Emergency Court of Appeals, and two state supreme courts—sustaining the delegation made in the present price provisions or in the closely similar rent provisions are collected in the Government's brief in the *Willingham* case, No. 464, pp. 22–23, n. 10.

The attack here [25] is addressed to the statutory declaration of policy, the standards relating to control of prices of processed agricultural commodities, and the asserted lack of findings.

Statement of Policy.—Section 1 (a) of the Act (Appendix, *infra*) sets forth the statutory objectives. It is declared to be in the interest of the national defense and necessary to the effective prosecution of the war that measures be taken for various essential purposes, including stabilization of prices, prevention of inflationary increases in prices and rents, prevention of wartime profiteering and other disruptive practices resulting from wartime scarcities, and protection of persons with fixed and limited incomes against

[25] The delegation issue is raised only in No. 375.

undue impairment of living standards. The legislative policy so expressed is definite and clear; it plainly satisfies the requirements which have been stated by this Court. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (Fair Labor Standards Act);[26] *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (Bituminous Coal Act);[27] *United States* v. *Rock Royal Co-op.*, 307 U. S. 533 (milk marketing provisions of Agricultural Marketing Agreement Act);[28] *Mulford* v. *Smith*,

[26] The pertinent provision, 29 U. S. C. 208 (a) provides that wage orders shall be issued to attain—

"as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce * * *."

[27] The pertinent provision, 15 U. S. C. 828, provides:

"Regulation of the sale and distribution in interstate commerce of bituminous coal is imperative for the protection of such commerce; there exist practices and methods of distribution and marketing of such coal that waste the coal resources of the Nation and disorganize, burden, and obstruct interstate commerce in bituminous coal, with the result that regulation of the prices thereof and of unfair methods of competition therein is necessary to promote interstate commerce in bituminous coal and to remove burdens and obstructions therefrom."

[28] The pertinent provision, 7 U. S. C. 602, provides:

"* * * to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period * * * *."

307 U. S. 38 (tobacco marketing quota provisions of the Agricultural Adjustment Act.) [29]

Petitioners have focused on one of the stated objectives, the protection of persons with relatively fixed incomes from undue impairment of their standard of living (Br. in No. 375, pp. 12–17). But this is obviously one of the purposes which will be served by stabilization of prices; and the Administrator has no roving commission to choose other means to accomplish the objective.

The statutory standards.—Sections 2 (a), 2 (c), 2 (d), 2 (g) and 2 (h) of the Emergency Price Control Act set forth standards which govern the Administrator's exercise of his authority to control prices. The standards of section 3 of the

"To protect the interest of the consumer by (a) approaching the level of prices * * * by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand * * * and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish * * *."

[29] The pertinent provision, 7 U. S. C. 1282, provides:

"* * * to regulate interstate and foreign commerce in * * * tobacco * * * to the extent necessary to provide an orderly, adequate, and balanced flow of such commodities in interstate and foreign commerce through storage of reserve supplies, loans, marketing quotas, assisting farmers to obtain, insofar as practicable, parity prices for such commodities and parity of income, and assisting consumers to obtain an adequate and steady supply of such commodities at fair prices."

Act of October 2 likewise apply.[30] The standards mentioned are detailed and specific; they carefully circumscribe the Administrator's discretion, guiding him in respect of when he may act and how he may act.

The Administrator may promulgate price regulations when in his judgment "the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act" (Act, Section 2 (a)). Petitioners concede that such a rise or threatened rise of beef prices preceded the present administrative action (No. 375, Pet. Brief, p. 60). The Act does not leave the promulgation of price regulations to the Administrator's subjective and unconfined discretion. He must examine the pertinent data objectively to determine whether the promulgation of a regulation would effectuate the Act's purposes.[31] The grant of

[30] Executive Order 9250 (7 F. R. 7871) directed the Administrator to exercise the authority conferred on the President by the amendatory Act to stabilize prices of agricultural commodities and products processed from agricultural commodities, so far as practicable, on the basis of levels which existed on September 15, 1942. Section 2 of the Act authorizes the President to redelegate in this manner.

[31] The circumstance that the Administrator must exercise "judgment" as to whether action would achieve the Act's purposes does not vitiate the conclusion that his discretion in determining whether to act is properly circumscribed. A provision of this nature is as necessary to sensible regulation as it is familiar. Thus in *United States* v. *Rock Royal*

power, moreover, acquires meaning from the clearly stated objectives of the Act (see pp. 61–62, supra). Cf. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 165–166. And the discretion reposed in the Administrator to select the commodities which are to be controlled is a recognition of the practical necessities of administration under such a war-time program. Cf. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. Inflationary events may demand control of some prices and not of others. Regulation of producers' or distributors' prices may serve as an effective check on price increases by their suppliers. The law does not require that all products be uniformly controlled or exempted from control. Cf. *Tigner* v. *Texas*, 310 U. S. 141.[32]

Co-op., 307 U. S. 533, the Court held lawful a delegation of authority to the Secretary of Agriculture which provided that he might initiate action whenever he "has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title" (7 U. S. C. 608c (3)). Similarly in *Dakota Central Telephone Co.* v. *South Dakota*, 250 U. S. 163, the Court upheld the Joint Resolution of July 16, 1918, which authorized the President to take over the telephone system of the country "whenever he shall deem it necessary for the national security or defense * * * and to operate the same in such manner as may be needful or desirable" (40 Stat. 904). Plainly, the Act is not invalid simply because the Administrator is entitled to exercise his judgment; such an exercise is implicit in such standards as "public convenience and necessity," "public interest," "just and reasonable," and similar traditionally proper standards.

[32] Under the present legislation, which contains a conditional grant of authority to control livestock prices (original Act, Secs. 2, 3; Amendatory Act, Secs. 1–3) any objection

The Acts contain detailed standards governing the determination of maximum price levels. Not only must the prices fixed be "generally fair and equitable," and "effectuate the purposes of this Act" (Act, Section 2 (a)), but in addition and going beyond the usual provisions governing rate making, price fixing and wage determinations, which contain the familiar requirements of fairness, equity, or reasonableness, there is here a statutory guide in terms of time, that is, in terms of prices actually prevailing as of a given period. The basic Act directs the Administrator to give consideration, so far as practicable, to prices prevailing between October 1 and October 15, 1941. By the amendatory Act, stabilization of prices at the levels of September 15, 1942 is directed so far as practicable, a standard thus being provided for the guidance of the Administrator in holding fast against further price increases. It may be observed that the "dollars-and-cents" ceilings established by Revised Maximum Price Regulation No. 169 set prices at a level slightly higher than those prevailing between March 16 and March 28, 1942[33] and resulted in stabilization

addressed to asserted discrimination in favor of livestock sellers would seem to involve issues going to the validity of a particular regulation and would thus be barred by Section 204 (d). Such an objection in any event would not involve an issue of delegation.

[33] See Statement of Considerations accompanying Revised Maximum Price Regulation No. 169, OPA Service 41:339. This document was filed with the Division of the Federal

of beef prices on the basis of levels existing on September 15, 1942.[34]

The basic Act (Sec. 2 (a)) also provides for adjustments, in the determination of price levels, to take account of such relevant factors as the Administrator "may determine and deem to be of general applicability, including * * * Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits * * * during and subsequent to the year ended October 1, 1941." The similar provision in the rent section of the Act (Sec. 2 (b)) is discussed at p. 20, n. 8, of the Government's brief in the *Willingham* case, No. 464. The considerations and authorities there advanced indicate that it would have been impracticable for Congress rigidly to circumscribe the exercise of judgment by the Administrator as to the efficacy of adopting in particular situations, the statutory guide dates (October 1 to 15, 1941), or as to the weight to be given to particular "relevant" adjustment factors.

Further, under Section 3 of the Act of October 2, the maximum price established for any com-

---

Register. Under Sec. 2.4 (b) of the Federal Register Regulations, the Director has determined that filing constitutes compliance with the Federal Register Act (44 U. S. C. § 301 et seq.) and has excluded statements of considerations from publication.

[34] *Id.*, OPA Service 41 : 341-C, 41 : 341-D.

modity processed or manufactured in whole or in substantial part from any agricultural commodity must reflect to the producer of the commodity designated prices as set forth in two numbered clauses of the Section. The provisions of the second clause may be waived upon a finding of necessity to correct gross inequities. Modifications must be made in maximum prices for agricultural commodities or products processed therefrom in any case where it appears that this is necessary to increase production of a commodity for war purposes, or where increased costs since January 1, 1941 are not reflected in the maximum prices. Adequate weighting must be given to farm labor in setting prices for both agricultural products and commodities processed therefrom.

Insofar as practicable, the Administrator must consult with industry representatives before issuing an order affecting them. Finally, the preservation of Congressional guardianship over the authority delegated is indicated by the requirement in Section 301 of the original Act that the Administrator make quarterly reports to Congress, by the provision of the Act limiting its duration to June 30, 1943 (Section 1 (b)), and by the amendment thereto extending the life of the Act only to June 30, 1944 (Amendatory Act, Section 7 (a)).

Findings.—As suggested at pp. 23–27 of the Government's brief in the *Willingham* case, No. 464, the relevancy of the presence or absence of findings to the delegation issue is highly dubious; the question is more properly one which goes to the validity of a particular regulation and should therefore be urged in the exclusive statutory forum (see pp. 15–16, *supra*). It may be noted, however, that Section 2 (a) of the Emergency Price Control Act specifically requires findings in that every maximum price regulation must be accompanied by a "statement of considerations." Findings in support of the present Regulation appear both in the preamble of the Regulation itself and in the Statement of Considerations.[*] The latter contains a thoroughgoing description and analysis of the facts and considerations underlying the provisions adopted. There are findings as to the history, structure, and operation of the beef industry, the problems encountered under earlier price regulations, cattle price trends, the fairness and equitableness of the revised prices, and administrative compliance with the statutory objectives of increased production and price stabilization at the September 15, 1942, levels. In short, the considerations leading to the issuance of the Regulation have been articulated with a fullness that would be uncommon even under peacetime standards.

[*] See OPA Service 41 : 339 et seq.

CONCLUSION

For the foregoing reasons the judgments below should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

PAUL A. FREUND,
Special Assistant to the Attorney General.

THOMAS I. EMERSON,
Deputy Administrator,

ABRAHAM GLASSER,
DAVID LONDON,
A. M. DREYER,
HARRY L. SHNIDERMAN,
Office of Price Administration.

JANUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 375

BENJAMIN ROTTENBERG AND B. ROTTENBERG, INC., PETITIONERS,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 22, 1943.

CERTIORARI GRANTED NOVEMBER 8, 1943.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3885.

BENJAMIN ROTTENBERG ET AL.,

DEFENDANTS, APPELLANTS,

v.

UNITED STATES OF AMERICA.,

APPELLEE.

CONSOLIDATED APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENTS (WYZANSKI, J.), MARCH 10, 1943.

TRANSCRIPT OF RECORD.

LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
for Appellants.

EDMUND J. BRANDON,
UNITED STATES ATTORNEY,
WILLIAM T. McCARTHY,
JOSEPH J. GOTTLIEB,
ASSISTANT UNITED STATES ATTORNEYS,
for Appellee.

TABLE OF CONTENTS.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1942.

No. 3885.

BENJAMIN ROTTENBERG ET AL.,
DEFENDANTS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
APPELLEE.

TRANSCRIPT OF RECORD OF THE DISRICT COURT.

No. 16074, CRIMINAL,
THE UNITED STATES, by Indictment,
v.
BENJAMIN ROTTENBERG.

APPEAL OF BENJAMIN ROTTENBERG FROM JUDGMENT OF CONVICTION ENTERED ON MARCH 10, 1943.

(CASE NO. 16075 CONSOLIDATED WITH CASE NO. 16074 FOR APPEAL.)

INDICTMENT.

February 24, 1943.

DISTRICT COURT OF THE UNITED STATES OF AMERICA
District of Massachusetts

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the first Tuesday of December in the year of our Lord one thousand nine hundred and forty-two.

The Jurors for the United States of America, within and for the District of Massachusetts, upon their oath, present that

COUNT ONE:

1. Benjamin Rottenberg of Boston in the District of Massachusetts is made the defendant herein. The said defendant at all times hereinafter referred to was and is President and Treasurer of B. Rottenberg Co., Inc., a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, having an usual place of business at Boston in the District of Massachusetts, and at all times hereinafter referred to, said defendant was engaged at said place of business in the sale at wholesale of beef and veal carcasses and wholesale cuts thereof.

2. On or about the tenth day of December, 1942, the Administrator of the Office of Price Administration, pursuant to the authority granted under the Emergency Price Control Act of 1942, as amended, issued Revised Maximum Price Regulation No. 169, effective December 16, 1942, establishing maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof. At all times hereinafter mentioned said Revised Maximum Price Regulation No. 169 has been and is in full force and effect.

3. At all times hereinafter referred to, said Maximum Price Regulation No. 169, as amended, was effective under the provisions of Section 2 of the Emergency Price Control Act of 1942 (Public Law 421, 77th Congress), Approved January 30, 1942.

4. At all times hereinafter referred to, Revised Maximum Price Regulation No. 169, Section 1364.401, provides that on or after December 16, 1942, regardless of any contract, agreement, or other obligation, no person shall sell or deliver any beef carcass or beef wholesale cuts, and no person shall buy or receive any beef carcass or beef wholesale cuts at a price higher than the maximum price permitted by Section 1364.451, and no person shall agree, offer, solicit, or attempt to do any of the foregoing.

5. At all times hereinafter referred to, the sale and delivery

of beef and veal carcasses and wholesale cuts thereof was a matter within the jurisdiction of the Office of Price Administration.

6. At all times hereinafter referred to, the Office of Price Administration was an agency of the United States by virtue of the provisions of Section 201 of the aforesaid Emergency Price Control Act of 1942.

7. At all times hereinafter referred to, the maximum prices for beef and veal carcasses and wholesale cuts thereof were determined under Section 1364.451.

8. The defendant, on or about the eighteenth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, did wilfully, unlawfully, and knowingly violate Section 4 (a) of the Emergency Price Control Act of 1942, as amended, in that the said defendant Benjamin Rottenberg did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two rumps and rounds of beef, of Commercial Grade, weighing 341 pounds, for a total price of $112.53.

COUNT TWO:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-first day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised

Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two hindquarters of beef, of Choice Grade, weighing 386 pounds, and four hindquarters of beef, of Commercial Grade, weighing 734 pounds, for a total price of $377.32.

COUNT THREE.

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventh day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly, and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two hindquarters of beef, of Utility Grade, weighing 307 pounds, two hindquarters of beef, of Cutter Grade, weighing 300 pounds, five hindquarters of beef, of Cutter Grade, weighing 683 pounds, four hindquarters of beef, of Cutter Grade, weighing 617 pounds, one forequarter of beef, of Cutter Grade, weighing 125 pounds, five forequarters of beef, of Utility Grade, weighing 627 pounds, for a total price of $963.45.

COUNT FOUR:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fourteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachu-

setts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes six hindquarters of beef, of Commercial Grade, weighing 912 pounds, one hindquarter of beef, of Utility Grade, weighing 142 pounds, and one hindquarter of beef, of Cutter Grade, weighing 136 pounds, for a total price of $404.60.

COUNT FIVE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Morris Kepnes, of Chelsea, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Morris Kepnes two hindquarters of beef, of Good Grade, weighing 351 pounds, for a total price of $125.00.

COUNT SIX:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifth day of February in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Natale Lania, of Waverly, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Natale Lania one hindquarter of beef, of Good Grade, weighing 172 pounds, for a total price of $56.76.

COUNT SEVEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the thirty-first day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Cosmo C. Damiano, of Newton Centre, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Cosmo C. Damiano one hindquarter of beef, of Good Grade, weighing 162 pounds, for a total price of $56.31.

COUNT EIGHT:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the sixth day of January in the year nineteen hun-

dred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Cosmo C. Damiano, of Newton Centre, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Cosmo C. Damiano one hindquarter of beef, of Utility Grade, weighing 195 pounds, for a total price of $71.49.

COUNT NINE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the second day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini two hindquarters of beef, of Utility Grade, weighing 319 pounds, two hindquarters of beef, of Good Grade, weighing 361 pounds, one hindquarter of beef, of Choice Grade, weighing 207 pounds, and one hindquarter of beef of Commercial Grade, weighing 198 pounds, for a total price of $452.09.

COUNT TEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs

1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini five hindquarters of beef, of Utility Grade, weighing 594 pounds, and two hindquarters of beef, of Utility Grade, weighing 220 pounds, for a total price of $284.90.

COUNT ELEVEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fourteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini two hindquarters of beef, of Commercial Grade, weighing 310 pounds, and six hindquarters of beef, of Utility Grade, weighing 773 pounds, for a total price of $368.22.

COUNT TWELVE:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the nineteenth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Scappini, of Somerville, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Scappini six hindquarters of beef, of Commercial Grade, weighing 1055 pounds, for a total price of $369.25.

COUNT THIRTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventh day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Samuel Burgoyne, of Lexington, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Samuel Burgoyne two hindquarters of beef, the grade of which is to your Grand Jurors unknown, weighing approximately 253½ pounds, for a total price of $83.66.

COUNT FOURTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventeenth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon three hindquarters of beef, of Utility Grade, weighing 404 pounds, for a total price of $125.24.

COUNT FIFTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-fourth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon three forequarters of beef, of Utility Grade, weighing 442 pounds, and three hindquarters of beef, of Utility Grade, weighing 356 pounds, for a total price of $232.50.

COUNT SIXTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the twenty-eighth day of December in the year nineteen hundred and forty-two, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon four hindquarters of beef, of Utility Grade weighing 489 pounds, two hindquarters of beef, of Commercial Grade, weighing 294 pounds, and two hindquarters of beef, of Utility Grade, weighing 209 pounds, for a total price of $347.20.

COUNT SEVENTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the fifth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon six hind

quarters of beef, of Utility Grade, weighing 696 pounds, and two forequarters of beef, of Utility Grade, weighing 242 pounds, for a total price of $304.40.

COUNT EIGHTEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the second day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon two forequarters of beef, the grade of which is to your Grand Jurors unknown, weighing 234 pounds, for a total price of $65.52.

COUNT NINETEEN:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the seventh day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say,

the said defendant did sell and deliver to Joseph Gordon five forequarters of beef, the grade of which is to your Grand Jurors unknown, weighing 642 pounds, and six hindquarters of beef, the grade of which is to your Grand Jurors unknown, weighing 898 pounds, for a total price of $476.10.

COUNT TWENTY:

And the Jurors aforesaid, upon their oath aforesaid, further present that each and every allegation contained in paragraphs 1 to 7 inclusive in Count One hereof, is reaffirmed, realleged, and incorporated as if herein set forth in full.

On or about the eighth day of January in the year nineteen hundred and forty-three, at Boston in the District of Massachusetts, the said defendant Benjamin Rottenberg did unlawfully, knowingly and wilfully violate Section 4 (a) of the said Emergency Price Control Act of 1942, as amended, in that the said defendant did sell and deliver wholesale cuts of beef to Joseph Gordon, of Boston, Massachusetts, at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended; that is to say, the said defendant did sell and deliver to Joseph Gordon four hindquarters of beef, of Commercial Grade, weighing 579 pounds, for a total price of $202.65.

A True Bill.

EARL B MUNRO,
Foreman of the Grand Jury.

Joseph J. Gottlieb
Assistant United States Attorney for the District of Massachusetts.

DISTRICT OF MASSACHUSETTS, February 24, 1943.

Returned into the District Court by the Grand Jurors and filed.

ARTHUR M. BROWN,
Deputy Clerk.

This indictment is presented by the grand jury at the present December Term of this court, 1942, when, on February 24, 1943,

the Honorable George C. Sweeney, District Judge, sitting, the said Benjamin Rottenberg is set to the bar, and, having waived the reading of the indictment, says that thereof he is not guilty.

At the same term, on March 1, 1943, the defendant files the following Motion to Quash the Indictment:

MOTION TO QUASH THE INDICTMENT.

[Filed March 1, 1943.]

Now comes the defendant, Benjamin Rottenberg, by his counsel, and moves the court to quash the indictment herein and each and every count thereof, upon the following grounds:

1. That the indictment and no count thereof sets forth a criminal offense against the United States of America.

2. That the indictment and no count thereof sets forth an offense against the United States of America with the certainty, particularity and definiteness required by the rules of criminal procedure and pleading.

3. That the allegations in the indictment and each and every count thereof do not set forth the essential elements of the offense with sufficient clearness, uncertainty and particularity to enable the defendant to understand the nature of the charge against him, more particularly in that

(a) The indictment in each count thereof purports to charge the defendant with a violation of Section 4 (a) of the Emergency Price Control Act of 1942 as amended, in that the defendant is alleged to have sold and delivered wholesale cuts of beef at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169, as amended, the sale and delivery of which is prohibited at prices higher than those established by said Section, and

(b) The maximum price of each wholesale beef cut in each of said counts, is therefore an essential element to the commission of the offense stated and various unit prices apply to different wholesale beef cuts but are not set forth in said indictment or

any count thereof and does not apprise the defendant of whether the prices charged on each wholesale cut of beef is in fact higher than those provided for by said Revised Maximum Price Regulation No. 169 as amended; and

(c) The maximum price of each of said wholesale beef cuts is determined not only under Section 1364.451 of said Revised Maximum Price Regulation No. 169, as amended, as alleged in paragraph 7 of the indictment and every count thereof, but also under Sections 1364.452, 1364.453 and 1364.454 of said Regulation.

4. In each count of the indictment herein the allegations of fact necessary to constitute a crime against the United States of America are insufficient, uncertain and ambiguous.

5. That the allegations in the indictment and each count thereof are in violation of the defendant's constitutional rights under the Fifth Amendment to the Constitution of the United States in that upon either conviction or acquittal, he would not be able to plead former jeopardy.

6. That the Act of Congress known as the Emergency Price Control Act of 1942, as amended, is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

7. That the Act of Congress known as the Emergency Price Control Act of 1942, goes beyond the Constitutional authority of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act it seeks to establish legislation founded upon indefinite or indeterminable standards which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

8. That the Act of Congress known as the Emergency Price Control Act of 1942 is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the price administrator to pass a prohibitory law, penal in nature.

9. That the Emergency Price Control Act of 1942, insofar as it purports to confer upon the price administrator, pointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

10. Revised Maximum Price Regulation No. 169 as amended, is invalid in whole or in part for the reason that it was founded upon indefinite or indeterminable standards which could not be known or determined at the time of the issuance of the said Regulation and not so sufficiently established as to support an indictment for a criminal offense under any of its terms.

11. Revised Maximum Price Regulation No. 169 as amended, upon which the indictment and each and every count thereof is predicated infringes upon the power of Congress to make and enact laws of the United States.

12. Revised Maximum Price Regulation No. 169 as amended, arbitrarily, capriciously and unreasonably established such low maximum prices in the area where the defendant conducted his business as set forth at the time stated in the indictment as to invade the property rights of the defendant without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

13. Revised Maximum Price Regulation No. 169 as amended, is unjust and unreasonable and therefore invalid under the Constitution of the United States of America and more particularly under Article 1, Section 1 thereof, and the Fifth Amendment thereto, in that although said Regulation fixes maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof and a sale of such carcasses and cuts by the defendant at a price in excess thereof subjects the defendant to criminal prosecution under the provisions of the Emergency Price Control Act of 1942, no maximum price is fixed for the sale at the same time and in the same locality of the livestock from which said carcasses and

wholesale cuts are derived by the raiser or producer thereof; nor does the sale of the animal from which said carcass and wholesale cuts are derived by the raiser or producer thereof at any price whatsoever violate the provisions of said Regulation, nor subject said raiser or producer to criminal prosecution under the provisions of said Act.

14. That the Regulation upon which the indictment and each count thereof is predicated, is dependent upon determinations of fact, which determinations are not shown as required by law.

15. That Revised Maximum Price Regulation No. 169 as amended, issued by the Price Administrator is based upon a statement of purported consideration representing the opinion of the Price Administrator and is not in conformity with the Act of Congress known as the Emergency Price Control Act of 1942 as amended.

16. That Revised Maximum Price Regulation No. 169 as amended, issued by the price administrator is based upon a statement of purported considerations representing the opinion of the price administrator and is not supported by a finding or findings of fact which are sustained by any evidence and is insufficient to support a conviction upon an indictment setting forth the violation of said Regulation as constituting a criminal offense.

17. That Revised Maximum Price Regulation No. 169 as amended, is invalid because it was issued without prior approval of the Secretary of Agriculture in violation of Section 3 (e) of the Emergency Price Control Act of 1942.

18. That Revised Maximum Price Regulation No. 169 as amended, is invalid because the maximum prices fixed thereby for beef and veal carcasses and wholesale cuts thereof in this District are so unreasonable as to constitute a taking of private property without just compensation, in violation of the Fifth Amendment to the Constitution of the United States of America.

19. Where it does not appear from any Act of or statement of the price administrator in the fixing of the maximum prices as set out in Section 1364.451 relied upon in this indictment and each

count therein that he has given consideration as required by the amendment to the Emergency Price Control Act, Acts of Congress, October 2, 1942 to the relation between the price or prices of livestock and the products resulting from the processing of agricultural commodities so as to provide that a generally fair and equitable margin shall be allowed for such processing then Section 1364.451 is invalid in whole or in part by reason of the failure of the Price Administrator to so consider.

20. The terms of the Revised Maximum Price Regulation No. 169 as amended, are too vague, indefinite and uncertain

(a) to guide the defendant with reasonable certainty in determining what conduct is permissable and what conduct is punishable so as to enable him to prepare and make his defense, thus depriving him of his property in violation of the Fifth Amendment to the Constitution of the United States of America;

(b) to satisfy the requirement of the Sixth Amendment to the Constitution of the United States of America by apprising the defendant with reasonable certainty of the conduct which will render him liable to punishment for the commission of the offences with which he is charged; and

(c) to enable the defendant to plead an acquittal or conviction to the offenses with which he is charged in the indictment herein in bar to a further prosecution against him based upon the same matters or things, or any of them on which the indictment is laid.

21. That the Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress) in so far as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price for maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is void, because of unconstitutional delegation of legislative power.

22. The Emergency Price Control Act of 1942 is invalid because

it purports to exercise the police power which is reserved to the states respectively or to the people under the provisions of the Tenth Amendment to the Constitution.

23. That count 1 of said indictment alleges that the defendant sold and delivered "rumps and rounds" at prices higher than set forth by the maximum price determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended, but no such wholesale cut as "rumps and rounds" for which a price can be determined is set forth in said Regulation.

Wherefore, the defendant prays that he be not held to answer further to said indictment.

By his Attorneys,

JOHN H. BACKUS.
LEONARD PORETSKY.

On the same day, the foregoing motion to quash came on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and after argument thereon is denied.

At the same term on March 3, 1943, the defendant files the following Motion to Amend his Motion to Quash:

AMENDMENT TO MOTION TO QUASH INDICTMENT.

[Filed March 3, 1943.]

Now comes the above-named defendant and moves to amend motion to quash by adding thereto the following:

Section 2 (a) Emergency Price Control Act Public Law 421—77th Congress requires as a condition of each regulation or order issued by the price administrator that "Every regulation or order issued under the foregoing provisions of this sub-section (Section 2 (a)) shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order".

And it appearing as a requirement of law that such regulation order or consideration shall be filed with the Division of the Federal Register and it further appearing from the provisions of Re-

vised Maximum Price Regulation No. 169 that such considerations as were determined by the price administrator in the issuance of said Regulation were filed with the Division of the Federal Register and by the provisions of the Act of Congress October 2, 1942 it is required that Section 3 (2) "in the fixing of maximum prices on products resulting from the processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing"; provided further, "that in fixing price maximums for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity as provided in this Act adequate weighting shall be given to farm labor".

And it appearing from the statement of considerations filed with the Federal Register by the price administrator that no consideration was given to

1st.—a generally fair and equitable margin for processing an agricultural commodity including livestock; and

2nd—adequate weighting of farm labor.

Section 1364.451 is invalid and void because of the failure in whole or in part to so consider and this defendant should not be called upon to plead further and this indictment should be quashed.

By his Attorneys,

JOHN H. BACKUS.
LEONARD PORETSKY.

On the same day, the foregoing motion to amend the motion to quash comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and is denied by the court if it has jurisdiction so to do.

On the same day it is ordered by the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, that this indictment and indictment No. 16075, United States *v.* B. Rottenberg Co., Inc., be tried together.

On the same day the defendant is set to the bar to be tried, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and a jury is duly empanelled and sworn to try the issue, videlicit, Benjamin Knudson, Jr., Foreman, Milford F. Daniels, Eugene T. Ricketson, Don Allen Rogers, Thomas P. Smith, William H. Manning, C. Lane Goss, John A. McGowan, Frank B. Howland, Charles F. Breed, Thomas R. Brown, Thomas C. Hooyer.

This cause, together with cause numbered 16075, comes on for trial on the pleadings and evidence on the third, fourth, and fifth days of March, 1943.

On the fifth day of March, 1943, at the close of the evidence, the defendant renews his motion to quash the indictment and upon consideration thereof the motion is denied by the court.

On the same day the defendant files the following Motion for Directed Verdict on Counts 1 and 2 of the Indictment on the Ground of Variance:

MOTION FOR DIRECTED VERDICT ON COUNTS 1 AND 2 OF THE INDICTMENT ON THE GROUND OF VARIANCE.

[Filed March 5, 1943.]

Now comes the defendant, Benjamin Rottenberg, and moves that the jury be directed to return a verdict of Not Guilty on counts 1 and 2 of the indictment on the ground of variance for the following specified reasons:

1. That in count 1 of the indictment the defendant is alleged to have sold and delivered wholesale cuts of beef to Morris Kepnes of Chelsea, Massachusetts at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended; that is to say, the defendant did sell and deliver "two rumps and rounds of beef of commercial grade weighing 341 pounds for a total price of $112.53".

That in support of said count in the indictment the Government

offered testimony from the witness Morris Kepnes, that he purchased "two grade A rumps and rounds".

That your defendant respectfully submits that Grade A rumps and rounds are classified as "good" and not of "commercial" grade as alleged in the indictment.

2. That in count 2 of the indictment the defendant is alleged to have sold and delivered wholesale cuts of beef to Morris Kepnes of Chelsea, Massachusetts at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended; that is to say, the defendant did sell and deliver to Morris Kepnes "two hindquarters of beef, of choice grade weighing 386 pounds and four hindquarters of beef of commercial grade weighing 734 pounds for a total price of $377.32".

That in support of said count in the indictment the Government offered testimony from the witness Morris Kepnes that he purchased "two choice hindquarters AA and four choice Heifer hinds".

That your defendant respectfully submits that testimony that "four choice Heifer hinds" were purchased cannot support or prove the allegation in the indictment that the defendant did sell and deliver "four hindquarters of beef of commercial grade".

By his Attorneys,

JOHN H. BACKUS.

LEONARD PORETSKY.

On the same day the court grants the motion for directed verdict on count 2 of the indictment and denies the motion as to count 1.

On the same day defendant files a motion for directed verdict upon all the counts of the indictment which is granted as to counts 2, 6, 7, 8, 13, and 14 and denied as to the remaining counts.

This cause is thereupon committed to the jury, who, after hearing all matters and things concerning the same, return their verdict

therein and upon oath say that the defendant is guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, and 20 and that by direction of the court upon counts 2, 6, 7, 8, 13, and 14 the defendant is not guilty.

Thereupon on March 9, 1943, the defendant files the following Motion in Arrest of Judgment:

MOTION IN ARREST OF JUDGMENT.

[Filed March 9, 1943.]

Now comes the above named defendant in the above entitled cause, and moves that the verdict returned against him by the jury on the fifth day of March, 1943, be set aside, revoked, stopped and stayed as if no verdict had been returned against him for the following reasons:

1. The provisions of Emergency Price Control Act of 1942, Sections 204 (a), (b), (c) and (d) which oust the trial court of jurisdiction to pass upon the validity of any regulation, order or price schedule made by the price administrator is unconstitutional in that it violates the Sixth Amendment to the Constitution of the United States by depriving the defendant of a full trial in the State and District in which it is alleged the crime was committed.

2. The provisions of Emergency Price Control Act of 1942, Sections 204 (a), (b), (c) and (d) requiring that the issue in a criminal case be tried partly in one court and partly in another is unconstitutional and void in that it violates the Sixth Amendment to the Constitution of the United States by depriving the defendant of a full trial in the State and District in which it is alleged the crime was committed.

3. That Revised Maximum Price Regulation No. 169 as amended, is unconstitutional and void in that it restricts or limits the price or prices to be charged by slaughterers and wholesalers and favors the farmer over the slaughterer and the producer over the processor by not limiting or restricting prices which may be charged by the farmer or producer.

4. The Revised Maximum Price Regulation No. 169 as amended, Section 1364.451 (b) which requires the defendant to determine and fix what is the maximum ceiling price in accordance with the provisions of paragraph (a) of Section 1364.451 and specified in Section 1364.452 minus the required deduction specified in Section 1364.453 plus permitted additions in Section 1364.454 is a mathematical problem of variable content.

5. The Revised Maximum Price Regulation No. 169 as amended, Section 1364.451 requires the defendant to define and fix the crime with which he is charged and is in violation of his rights under the Fifth and Sixth Amendments to the Constitution of the United States.

6. Neither count in the indictment sets forth with the certainty and definiteness required by the rules of criminal pleading a crime to which the defendant can plead former conviction or double jeopardy in that the indictment and no count thereof specifies a price unit at which the defendant is alleged to have sold each wholesale cut.

7. Revised Maximum Price Regulation No. 169 as amended is invalid in whole or in part because it establishes under Section 1364.453 (c) a lower price for beef carcasses and beef wholesale cuts sold to a wholesaler than those which are applicable to a retailer purchasing the same article from the same seller.

By his Attorneys,

JOHN H. BACKUS.
LEONARD PORETSKY.
WILLIAM H. LEWIS.

Denied 3/10/43

CHARLES E. WYZANSKI, Jr.,
USDJ.

On March 10, 1943, the court, after hearing, denies the defendant's motion in arrest of judgment.

On the same day the defendant files the following Motion for a New Trial:

MOTION FOR NEW TRIAL.

[Filed March 10, 1943.]

Now comes Benjamin Rottenberg, the above-named defendant in the above-captioned cause, and moves that the verdict returned against him by the jury on March 5, 1943, be set aside, revoked, stopped and stayed as if no verdict had been returned against him and that he be granted a new trial upon the following newly discovered evidence which was not available to him at the time of his trial:

That at a hearing of the subcommittee of the committee on Agriculture and Forestry held at Washington, D. C., on Wednesday, March 3, 1943, the Honorable Prentiss M. Brown, price administrator testified and declared as follows:

> Senator Bushfield. Pardon me for interrupting, Senator, (Brown) this testimony that has been given here by the meat men, that it is simply impossible for them to make ends meet on meat that they sell the Government—of course, you don't uphold that situation, do you?
>
> Mr. Brown. No. I am going into that right now, Senator That is the main subject of my discussion. I want to say that I think I am being educated, and the committee is being educated, very well by that bugaboo of the farmer and the consumer, the middle man. It seems to me he has made a pretty good case here. There is a subcommittee of Agriculture now, I think, about to look into the question of why the spread between the producer and the consumer. I think Mr. Cooke and Mr. La Roe have given us a pretty good answer to that question, and I hope that subcommittee reads that testimony. The middle man performs a very necessary function.
>
> Now, Mr. Chairman, I want to admit frankly that these gentlemen are right in their contention that they are entitled to the same margin on the reduced production of their goods

that they had under uncontrolled conditions. I think they not only have made a good case along that line, but it is clear, under the McKellar Amendment to the Price Control bill, which all of us agree to, that that right is definitely set forth in the statute and should be followed, and I don't think it has been followed.

The Chairman. That is, that they shall receive a reasonable profit.

Mr. Brown. A reasonable profit, yes, a reasonable margin.

(Transcript of testimony, pages 749 and 750.)

. . . . . .

Senator Aiken. And you don't contemplate fixing the ceiling on hogs, and we will say other products, until and unless the situation shows signs of getting completely out of hand?

Mr. Brown. That is right. But I am going to do every thing I can to see that these people who are here today get a reasonable margin, which ought to be the margin they got previous to the imposition of these terrible restrictions.

(Transcript of testimony, pages 760 and 761.)

By his Attorneys,

WILLIAM H. LEWIS.
LEONARD PORETSKY.
JOHN H. BACKUS.

Denied 3/10/43.

CHARLES E. WYZANSKI, Jr.

On the same day the foregoing motion, after consideration, is denied by the court.

On the same day the following Judgment and Commitment is entered:

JUDGMENT AND COMMITMENT.

March 10, 1943.

On this tenth day of March, 1943, came the United States Attorney, and the defendant Benjamin Rottenberg appearing in proper person, and by counsel and,

The defendant having been convicted on Verdict of Guilty of the offense charged in counts 1, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19, and 20 in the indictment in the above-entitled cause, to wit: Violation of Revised Maximum Price Regulation 169, as amended, of the Emergency Price Control Act of 1942, as amended (Public Law 421, 77th Congress), Approved January 30, 1942; it is by the court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General for imprisonment in an institution of the type to be designated by the Attorney General or his authorized representative for the period of six months and to pay a fine of one thousand (1000) dollars; and that said defendant be further imprisoned until payment of said fine, or until said defendant is otherwise discharged as provided by law.

It is further ordered that the clerk deliver a certified copy of this judgment and commitment to the United States marshal or other qualified officer and that the same shall serve as the commitment herein.

CHARLES E. WYZANSKI, JR., *Judge*.

From the foregoing judgment the defendant claims an appeal to the United States Circuit Court of Appeals for the First Circuit.

On the eighth day of April, 1943, the defendant files a motion to extend time for filing bill of exceptions, which motion is duly allowed by the court, the Honorable Charles E. Wyzanski, Jr., sitting, and the time for filing the bill of exceptions is extended to June 20, 1943.

BILL OF EXCEPTIONS.

[Filed in No. 16074 and No. 16075 on May 6, 1943.]

These are two indictments consolidated for trial, No. 16074 relating to the individual defendant and No. 16075 to the corporate defendant each brought under the Emergency Price Con-

trol Act of 1942 as amended wherein the defendants are charged with violating Section 4 (a) of the same Act and Section 1364.401 of Revised Maximum Price Regulation No. 169 as amended, hereinafter called the Regulation by wilfully, knowingly and unlawfully selling wholesale cuts of beef at prices in excess of the maximum prices permitted under Section 1364.451 of said Regulation:

Count 1. Charging that on or about December 18, 1942, the defendants did sell and deliver to Morris Kepnes 2 rumps and rounds of beef of commercial grade weighing 341 pounds for a total price of $112.53;.

Count 3. Charging that on or about January 7, 1943, the defendants did sell and deliver to Morris Kepnes 5 fores of beef of utility grade weighing 627 pounds, 2 hinds of beef of utility grade weighing 307 pounds, 1 fore of beef of cutter grade weighing 125 pounds and 11 hinds of beef of cutter grade weighing 1600 pounds for a total price of $963.45.

Count 4. Charging that on or about January 14, 1943, the defendants did sell and deliver to Morris Kepnes 6 hinds of beef of commercial grade weighing 912 pounds, 1 hind of beef of utility grade weighing 142 pounds and 1 hind of beef of cutter grade weighing 156 pounds for a total price of $404.60;

Count 5. Charging that on or about January 15, 1943, the defendants did sell and deliver to Morris Kepnes 2 hinds of beef of good grade weighing 331 pounds for a total price of $125.00;

Count 9. Charging that on or about January 2, 1943, the defendants did sell and deliver to Joseph Scappini 2 hinds of beef of utility grade weighing 319 pounds, 2 hinds of beef of good grade weighing 361 pounds, 1 hind of beef of commercial grade weighing 198 pounds; 1 hind of beef of choice grade weighing 207 pounds, for a total price of $452.09;

Count 10. Charging that on or about January 5, 1943, the defendants did sell and deliver to Joseph Scappini 7 hinds of beef of utility grade weighing 814 pounds for a total price of $284.90;

Count 11. Charging that on or about January 14, 1943, the defendants did sell and deliver to Joseph Scappini 2 hinds of beef of commercial grade weighing 310 pounds, 6 hinds of beef of utility grade weighing 773 pounds for $368.22;

Count 12. Charging that on or about January 19, 1943, the defendants did sell and deliver to Joseph Scappini 6 hinds of beef of commercial grade weighing 1055 pounds for $369.25;

Count 14. Charging that on or about December 17, 1942, the defendants did sell and deliver to Joseph Gordon 3 hinds of beef of utility grade weighing 404 pounds for $125.24;

Count 15. Charging that on or about December 24, 1942, the defendants did sell and deliver to Joseph Gordon 3 fores of beef of utility grade weighing 442 pounds and 3 hinds of beef of utility grade weighing 356 pounds for a total price of $232.50;

Count 16. Charging that on or about December 28, 1942, the defendants did sell and deliver to Joseph Gordon 6 hinds of beef of utility grade weighing 698 pounds, 2 hinds of beef of commercial grade weighing 294 pounds for a total price of $347.20;

Count 17. Charging that on or about January 5, 1943, the defendants did sell and deliver to Joseph Gordon 6 hinds of beef of utility grade weighing 696 pounds and 2 fores of beef of utility grade weighing 242 pounds for a total price of $304.40;

Count 18. Charging that on or about January 2, 1943, the defendants did sell and deliver to Joseph Gordon 2 fores of beef of unknown grade weighing 234 pounds for $65.52;

Count 19. Charging that on or about January 7, 1943, the defendants did sell and deliver to Joseph Gordon 5 fores of beef of unknown grade weighing 642 pounds, 6 hinds of beef of unknown grade weighing 898 pounds for a total price of $476.10;

Count 20. Charging that on or about January 8, 1943, the defendants did sell and deliver to Joseph Gordon 4 hinds of beef of commercial grade weighing 579 pounds for $202.65.

Each defendant seasonably filed motions to quash the indictment as a whole and to each count thereof. The motions came on for hearing on March 1, 1943, and were denied after argu-

ment. By leave of court, the defendants were permitted to file an amendment to each motion to quash which was also denied. The denials were for the reasons set forth in the memorandum filed by the court on March 2, 1943, in the matter of United States *v.* J. Slobodkin, United States *v.* J. Slobodkin Co. Inc., and United States *v.* B. Rottenberg, Inc. et als. which may be referred to. The defendants being aggrieved by the court's denial of the motions to quash and amendments thereto duly claimed exceptions.

Thereafter the defendants having pleaded Not Guilty were set to trial before Wyzanski, J., and a jury on the third day of March, 1943. At the close of the evidence, each defendant filed a motion to dismiss count 1 of each indictment on the ground of variance, and filed certain requests to instruct the jury on rulings of law which will be hereinafter set forth. The court denied the dismissal of count 1 of each indictment on the ground of variance, but granted a motion for a directed verdict on counts 2, 6, 7, 8 and 13 for the corporate defendant and on counts 2, 6, 7, 8, 13 and 14 for the individual defendant, and refused to instruct the jury on the rulings of law numbered 17 to 33 inclusive as requested, whereupon in each instance the defendants duly excepted.

Thereafter on the 5th of March, 1943, the jury returned a verdict of "Guilty" on each count of each indictment submitted and thereafter, on the tenth day of March, 1943, each defendant made a motion in arrest of judgment and a motion for a new trial on the ground of newly-discovered evidence which were denied and each defendant duly claimed exceptions thereto. On the same day, the individual defendant was sentenced to imprisonment for a term of six months and to pay a fine of one thousand ($1,000) dollars and the corporate defendant was sentenced to pay a fine of one thousand ($1,000) dollars, which sentences, on motion of each defendant, were stayed.

Thereafter on the fifteenth day of March, 1943, notice of appeal was filed by each defendant and upon motion filed and

allowed by the court the appeals were consolidated in one record. The indictment and all pleadings, motions and exhibits are made a part of this bill of exceptions and may be referred to.

At the trial one Morris Kepnes called as a witness for the Government testified that he was in the wholesale beef business and on the 18th of December, 1942, purchased 2 rumps and rounds of beef of "A" grade weighing 341 pounds from Benjamin Rottenberg, gave a check for $64.79 which was the amount of the invoice, to the bookkeeper payable to the company and an additional check for $47.74 payable to cash. This was all the evidence at the trial as to the grade of beef involved in the first counts.

There was evidence upon all the other counts submitted to the jury from which the jury might have found that the allegations set out in each count were sustained by the evidence. The maximum prices as computed under Revised Maximum Price Regulation 169 as amended and submitted to the jury were as follows:

Count 1 — $42.62 for rumps and rounds or $85.25 if regarded as hinds.
Count 3 — $438.03.
Count 4 — $255.02.
Count 5 — $82.75.
Count 9 — $258.88.
Count 10 — $166.87.
Count 11 — $229.77.
Count 12 — $242.65.
Count 14 — $80.80.
Count 15 — $145.24.
Count 16 — $205.75.
Count 17 — $179.74.
Count 18 — $36.86.
Count 19 — $242.36.
Count 20 — $130.28.

The defendants introduced no testimony except the following offer of proof:

The defendants offered to prove through Sidney H. Rabinovitz, President of Colonial Provision Company of Boston, doing a business of eight (8) million dollars per year, and president and treasurer of Girard Packing Co. of Philadelphia; that he is a director and member of the executive committee of the N. E. Wholesale Meat Dealer's Association and has been serving on committees trying to solve the problem of the New England meat situation with our officials in Washington; that he has been in the wholesale meat business for thirty-six (36) years and is familiar with and follows daily livestock markets and costs of livestocks, is familiar with slaughtering and the dressed beef yield of cattle in Boston and market prices and cost to the trade therefor and methods employed in purchasing, processing and marketing livestock; that he is familiar with the grades of livestock used in the Boston market and slaughtered locally and the market prices of the dressed beef therefrom and follows the daily market quotations on dressed beef; that from December 10, 1942, to the early part of February, 1943, the following represents the average market price of livestock purchased at Chicago of the type which would produce the grades of meat specified:

AA (Choice) Steer livestock weight	1200 lbs.	@	16.70	200.40.
AA (Choice) Heifer livestock weight	900 lbs.	@	15.75	141.75.
A (Good) Steer livestock weight	1200 lbs.	@	15.50	186.00.
A (Good) Heifer livestock weight	900 lbs.	@	14.75	132.75.
B (Commercial) Steer livestock weight	1200 lbs.	@	13.50	162.50.
B (Commercial) Heifer livestock weight	900 lbs.	@	12.63	113.67.
B (Commercial) Cows livestock weight	1000 lbs.	@	12.50	125.00.
C (Utility) Cows livestock weight	900 lbs.	@	11.15	100.35.
Cutters and Canners livestock weight	800 lbs.	@	9.58	76.64.

That expenses of commission, insurance, taxes and feeding based on weight of the animal when purchased at .15 per cwt.

That expenses from time animal reaches Boston up to the time it becomes dressed beef include yarding, slaughtering, dressing of the animal and overhead, exclusive of capital investment of the slaughterer, averages 1.00 per cwt.

That from the time of purchase in Chicago until the arrival at Boston the livestock shrinks an average of 5 per cent and freight is paid at Boston on weight after shrinkage at the rate of .56 per cwt.

That from each animal is obtained hides and offal which is deducted from the gross cost of the beef; that these deductions are figured on the weight of the animal at Chicago, the hides being credited ..... @ 1.00 per cwt.
Offal ..... @ .70 per cwt.
Slaughter tallow, fat and bones ..... @ .30 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "AA" Steer at Boston Slaughtering Plant is $195.98
That the average dressed carcass yield of that grade of meat is 59 per cent of weight of livestock when purchased ..... 708 lbs.
That cost to slaughterer of dressed Carcass is $27.70 per cwt.
That cost to slaughterer of dressed Hind is 30.95 per cwt.
That cost to slaughterer of dressed Fore is 24.75 per cwt.

That adding expenses and deducting credits on the formula outlined the cost the dressed meat of the average "AA" Heifer at Boston Slaughtering Plant is $138.44
That the average dressed carcass yield of that grade of meat is 57 per cent of weight of livestock when purchased 513 lbs.
That cost to slaughterer of dressed Carcass is $26.99 per cwt.
That cost to slaughterer of dressed Hind is 30.25 per cwt.
That cost to slaughterer of dressed Fore is 24.00 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "A" Steer at Boston Slaughtering Plant is $181.42
That the average dressed carcass yield of that grade of meat is 57 per cent of weight of livestock when purchased .. 684 lbs.
That cost to slaughterer of dressed Carcass is $26.52 per cwt.
That cost to slaughterer of dressed Hind is 29.25 per cwt.
That cost to slaughterer of dressed Fore is 24.00 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "A" Heifer at Boston Slaughtering Plant is $129.44
That the average dressed carcass yield of that grade of meat is 55 per cent of weight of livestock when purchased 495 lbs.
That cost to slaughterer of dressed Carcass is $26.15 per cwt.
That cost to slaughterer of dressed Hind is 28.90 per cwt.
That cost to slaughterer of dressed Fore is 23.65 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "B" Steer at Boston Slaughtering Plant is $157.58
That the average dressed carcass yield of that grade of meat is 55 per cent of weight of livestock when purchased 660 lbs.
That cost to slaughterer of dressed Carcass is $23.88 per cwt.
That cost to slaughterer of dressed Hind is 26.13 per cwt.
That cost to slaughterer of dressed Fore is 21.88 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "B" Heifer at Boston Slaughtering Plant is $110.36
That the average dressed carcass yield of that grade of meat is 53 per cent of weight of livestock when purchased 477 lbs.
That cost to slaughterer of dressed Carcass is $23.14 per cwt.
That cost to slaughterer of dressed Hind is 25.39 per cwt.
That cost to slaughterer of dressed Fore is 21.14 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "B" Cow at Boston Slaughtering Plant is $121.32
That the average dressed carcass yield of that grade of meat is 54 per cent of weight of livestock when purchased 513 lbs.
That cost to slaughterer of dressed Carcass is $23.65 per cwt.
That cost to slaughterer of dressed Hind is 25.90 per cwt.
That cost to slaughterer of dressed Fore is 21.65 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average "C" Cow at Boston Slaughtering Plant is $97.04

That the average dressed carcass yield of that grade of meat is 51 per cent of weight of livestock when purchased 459 lbs.
That cost to slaughterer of dressed Carcass is $21.15 per cwt.
That cost to slaughterer of dressed Hind is 22.90 per cwt.
That cost to slaughterer of dressed Fore is 19.65 per cwt.

That adding expenses and deducting credits on the formula outlined the cost of the dressed meat of the average Cutter & Canner at Boston Slaughtering Plant is $73.70

That the average dressed carcass yield of that grade of meat is 44 per cent of weight of livestock when purchased 352 lbs.
That cost to slaughterer of dressed Carcass is $20.94 per cwt.
That cost to slaughterer of dressed Hind is 20.94 per cwt.
That cost to slaughterer of dressed Fore is 20.94 per cwt.

That to each of the figures representing the cost to the slaughterer of each wholesale beef cut should be added $1 per cwt. representing a fair and equitable margin of profit to the slaughterer including return on capital investment.

That the foregoing costs as set forth in the schedules and the fair and equitable margin therein established and computed are all based upon a business efficiently managed and conducted and no business, properly managed and efficiently conducted, could sell any of the specified grades of beef or wholesale beef cuts at the maximum prices established by Revised Maximum Price Regulation No. 169 as amended, without losing money on each such sale and no margin of profit or return could be realized upon any such sale.

That the practice is for the slaughterer to sell the beef and wholesale beef cuts to wholesalers to take the beef to their place of business or have it carted there; that the cartage and delivery expense is to be added to the cost by the slaughterer if delivered by him; that from the vehicle at the door of the wholesaler's establishment, luggers carry the beef on their shoulders into the premises where the beef is hung on trolley hooks which roll along monorail overhead tracks into refrigerated chests and is there displayed for sale by the wholesaler. That there is a shrink

averaging 1 per cent between the time the beef is purchased from the slaughterer until it is resold by the wholesaler.

That he knows the defendant Rottenberg for twenty odd years and knows him to have been in the wholesale beef business for at least twenty years, that he is familiar with the type of business done by the defendant and knows that he handles and sells beef which is slaughtered locally at Boston; that the defendant conducts a small business in an experienced and efficient manner. That the minimum fair and equitable margin or return to a wholesaler similar to the defendant conducting an efficiently managed business would be approximately seven per cent (7%) of the gross sales or one and one-half dollars ($1.50) per hundredweight added to the cost of beef and wholesale beef cuts delivered at the door of the wholesaler, provided the wholesaler were able to procure and sell thirty thousand (30,000) pounds of beef per week. That unless this tonnage were maintained, a wholesaler of this class would show no net return on sales based upon the figures here outlined as a fair and equitable margin because expenses would exceed the amount of gross return from sales.

That under present conditions in the City of Boston, it is difficult for wholesalers of the type of the defendant to procure thirty thousand (30,000) pounds of beef per week.

That under Revised Maximum Price Regulation No. 169 as amended, the wholesaler is afforded no more than seventy-five cents ($.75) per hundredweight in any event and no wholesaler of the class of the defendant, even under normal conditions, could efficiently continue in business without losing money on that margin of gross return and under present conditions with restricted operations, a substantial loss must result to every such wholesaler no matter how efficiently his business is conducted.

That under the provisions of said Revised Maximum Price Regulation No. 169 as amended, if one wholesaler sells to another wholesaler the seventy-five cents ($.75) per hundredweight referred to is reduced by fifty ($.50) cents thereby only leaving wholesaler number one a gross return of twenty-five cents ($.25)

per hundredweight. On a transaction of this nature wholesaler number one selling to wholesaler number two, incurs the following items of expense:

a. The cost of carting from the slaughterer to the wholesaler's place of business amounting to approximately twenty-five cents ($.25) per hundredweight.
b. The expense of lugging from the wagon at the door of the wholesaler's establishment into his premises and out again to the second wholesaler's wagon or truck, the average charge for which is 20 cents per beef quarter.
c. 1 per cent shrink from time of purchase from slaughterer until delivered by first wholesaler to second wholesaler.
d. The normal items of overhead and doing business, *i.e.*, salaries, rent, refrigeration, electrical costs, telephone, paper, burlaps, skewers, insurance, interest on loans, taxes, corporation expenses of filing returns and fees thereon, bad debts and depreciation.

Transactions between wholesaler number one and wholesaler number two must definitely result in a loss to the seller if he sells at the price established as the maximum by Revised Maximum Price Regulation No. 169 as amended, no matter how efficiently wholesaler number one conducts his business.

That the above proffer was made in the absence of the jury for the purpose of showing that Revised Maximum Price Regulation No. 169 as amended is arbitrary, capricious and contrary to the defense which the defendants would be able to show and is a denial therefore and violation of the rights of the defendants under the Fifth Amendment of the Constitution and their liberty and property guaranteed thereunder.

The court declined to receive the offer of proof on the ground that Section 204 of the Emergency Price Control Act of 1942 deprived the United States District Court of jurisdiction to entertain defense. The defendants duly saved exceptions to the court's declination of said offer of proof.

The foregoing is all the evidence material to the questions of law raised by these exceptions.

At the close of the evidence as hereinbefore stated the defendants requested the court to instruct the jury on rulings of law as follows:

17. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is unreasonable.

18. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is arbitrary.

19. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is invalid.

20. That as a matter of law Revised Maximum Price Regulation No. 169 as amended, particularly Section 1364.451 is illegal.

21. That Emergency Price Control Act of 1942 as amended, as a matter of law, is arbitrary.

22. That Emergency Price Control Act of 1942 as amended, as a matter of law, is unreasonable.

23. That Emergency Price Control Act of 1942 as amended, as a matter of law, is invalid.

24. That Emergency Price Control Act of 1942 as amended, as a matter of law, is illegal.

25. That as a matter of law the Act of Congress, known as the Emergency Price Control Act of 1942 as amended, is in violation of the power of Congress to make and enact laws under Section 1 of Article I of the Constitution of the United States.

26. As a matter of law the Act of Congress known as the Emergency Price Control Act of 1942, goes beyond the Constitutional authority of Congress in that by specific reference to enumerated subjects set out in Section 1 of said Act, it seeks to establish legislation founded upon indefinite or indeterminable standards, which could not be known or predicted at the time of the enactment of said Act and not so sufficiently established as to

support an indictment for a criminal offense under any of its terms or any regulation issued thereunder.

27. As a matter of law the Act of Congress known as the Emergency Price Control Act of 1942, is in violation of Section 1 of Article I of the Constitution of the United States in that it purports to authorize the price administrator to pass a prohibitory law, penal in nature.

28. As a matter of law the Emergency Price Control Act of 1942, insofar as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid Act, is invalid in whole or in part by reason of the indefiniteness of the standards set out in Section 1 of said Act.

29. As a matter of law Revised Maximum Price Regulation No. 169, as amended, is unjust and unreasonable and, therefore, invalid under the Constitution of the United States of America and more particularly, under Article 1, Section 1 thereof and the Fifth Amendment thereto, in that although said Regulation fixes maximum prices for the sale of beef and veal carcasses and wholesale cuts thereof and a sale of such carcasses and cuts by the defendant at a price in excess thereof subjects the defendant to criminal prosecution under the provisions of the Emergency Price Control Act of 1942, no maximum price is fixed for the sale at the same time and in the same locality of the livestock from which said carcasses and wholesale cuts are derived by the raiser or producer thereof; nor does the sale of the animal from which said carcasses and wholesale cuts are derived by the raiser or producer thereof at any price whatsoever violate the provisions of said Regulation, nor subject said raiser or producer to criminal prosecution under the provisions of said Act.

30. As a matter of law, the Regulation upon which the indictment and each count thereof is predicated, is dependent upon

determinations of fact, which determinations are not shown as required by law.

31. As a matter of law, where it does not appear from any act of or statement of the price administrator in the fixing of the maximum prices as set out in Section 1364.451 relied upon in this indictment and each count therein that he has given consideration as required by the Amendment to the Emergency Price Control Act, Acts of Congress, October 2, 1942, to the relation between the price or prices of livestock and the products resulting from the processing of agricultural commodities so as to provide that a generally fair and equitable margin shall be allowed for such processing, then Section 1364.451 is invalid in whole or in part by reason of the failure of the price administrator to so consider.

32. As a matter of law, the Emergency Price Control Act of 1942, (Public Law No. 421, 77th Congress) insofar as it purports to confer upon the price administrator, appointed under Section 201 of Title II of said Act, authority to establish a maximum price or maximum prices as will in his judgment be fair and practicable and will carry out the purposes of the aforesaid act, is void because of unconstitutional delegation of legislative power.

33. As a matter of law, the Section 2 (a) Emergency Price Control Act (Public Law 421—77th Congress) requires as a condition of each regulation or order issued by the price administrator that "Every regulation or order issued under the foregoing provision of this sub-section Section 2 (a) shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order". And it appearing as a requirement of law that such regulation, order or consideration shall be filed with the Division of the Federal Register and it further appears from the provisions of Revised Maximum Price Regulation No. 169 that such considerations as were determined by the price administrator in the issuance of said regulation were filed with the Division of the Federal Register and, by the provisions of the Act of Congress October 2, 1942 it is required that Section 3 (2) "in the fixing of maximum prices on products resulting from the

processing of agricultural commodities including livestock, a generally fair and equitable margin shall be allowed for such processing"; Provided further, "That in fixing maximum prices for agricultural commodities and for commodities processed or manufactured in whole or substantial part from any agricultural commodity as provided in this Act adequate weighting shall be given to farm labor". And it appearing from the statement of considerations filed with the Federal Register by the price administrator that no consideration was given to

1st—A generally fair and equitable margin for processing an agricultural commodity including livestock; and

2nd—Adequate weighting of farm labor.

Section 1364.451 is invalid and void because of the failure in whole or in part to so consider.

The court charged the jury as follows:

Mr. Foreman and Gentlemen of the Jury. This is the first criminal case to arise, at least in this District, if not anywhere, under the Emergency Price Control Act of 1942. You will have to consider the case or cases of two separate defendants, the first Benjamin Rottenberg Company, Inc., which I shall hereafter refer to as the corporation, and the other the case of Benjamin Rottenberg personally. At the outset of this case, the indictments upon which the case were founded presented twenty counts against the corporation and twenty counts against Benjamin Rottenberg personally. In order to abbreviate the case and in the light of the proof, you are going to be required to pass upon only fifteen counts in conhection with the corporation and fourteen in connection with Mr. Rottenberg personally. I am going to direct a verdict for the corporate defendants on five counts and I am going to direct a verdict for Mr. Rottenberg personally on six counts. Now, you ought to consider each defendant's case separately and you ought to consider each count separately. Each count refers to a different transaction and do not neglect carefully to analyze each separate count and each defendant's case

apart from the other defendant's case. Speaking generally, the indictments charged the corporate defendant and the individual defendant as having wilfully violated Section 4 (a) of the Emergency Price Control Act by having sold and delivered on different occasions beef at different prices higher than the ceiling prices established under the General Maximum Price Regulation Number 169 as amended, issued on the tenth day of December last.

This is a criminal case, and in a criminal case, the Government must persuade you beyond a reasonable doubt that its charge is correct. On each count the Government has that burden. Every count you must ask yourself, whether or not that count is so sustained that you can beyond a reasonable doubt convict the defendant. You will have no occasion in this case to consider whether the statute, that is to say, the Emergency Price Control Act, is or is not constitutional or otherwise valid. You will have no occasion in this case to consider whether the Regulation, the General Maximum Price Regulation Number 169, is or is not valid. You ought to consider only whether the prices which I shall shortly tell you about were exceeded wilfully by the corporate defendant and were exceeded wilfully by the individual defendant. Both the corporate defendant and the individual defendant have the benefit of a presumption of innocence. It is not quite correct to say as has been intimated to you that nobody challenges the facts in this case. The defendants by their pleas of "not guilty" have challenged, have necessarily challenged the Government on the facts as well as the law and their challenge is as effective as a plea of "not guilty" as it could be in any other way. Now it will at once appear to you that the difficult question of law in this case turns on the word, "wilfully". When does a corporataion "wilfully" violate a statute? Of course, a corporation is not an individual. A corporation is a theoretical entity, something that is an abstract. A corporation has to act through individuals. The question is whether the individuals acting for the corporation acted wilfully. If they acted wilfully, then their actions imputed to the corporation. Now, what does wilfully mean? As used in this

statute wilfully means knowingly or with a careless indifference as to what the facts are, acting without even endeavoring to find out what the situation is. You have undoubtedly at various times heard the maxim that everyone is presumed to know the law. That maxim may mislead you in this case. In this particular type of case, you must find that those who acted for the corporation acted knowing of the Regulation or deliberately choosing to remain in ignorance of the Regulation. Now, I have explained to you that a corporation can be found to have wilfully violated a statute if one of its agents acting for it acted wilfully and in this case, there are two agents who are alleged to have acted for the corporation and you can find the knowledge on the part of Mr. Miller, if he had such knowledge, is to be imputed to the corporation and you can find that Mr. Rottenberg if he had such knowledge had knowledge which can be imputed to the corporation. Indeed, if you find that Mr. Miller while acting for the corporation acted wilfully in violation of the Regulation, it necessarily follows that the corporation violated the Regulation wilfully and if you find that Mr. Rottenberg wilfully violated the Regulation acting for the corporation, it necessarily follows that the corporation itself wilfully violated the Regulation. Now I ought to say something to you about wilful violation in connection with Mr. Rottenberg. Mr. Rottenberg was, as the United States attorney has pointed out, president and treasurer and undoubtedly a large stockholder in the corporation. The mere fact that a man is an officer, director or stockholder of a corporation which commits a crime does not mean that he himself has committed a crime. The critical question is whether he used the corporation as an instrument or device for committing a crime. If he used the corporation as a means of wilfully violating the statute, he would be personally liable. The question does not turn on whether or not he was merely an officer or stockholder but, was he the sort of officer or stockholder who used the corporation as the instrument for the accomplishment of a wilful violation of the statute?

Now, I have said to you that you must look at each of the

counts charged separately. Each of the counts charges a wilful violation of the Act through a sale and delivery of certain specified types of meat at certain prices. Now, I have said that I am going to allow you to consider a total of fourteen counts or if you please, fourteen transactions in which Mr. Rottenberg personally is charged and fifteen counts or transactions in which the corporation is charged. Four of those counts relate to transactions as to which Mr. Scappini testified on Wednesday, four of them are counts as to which Mr. Kepnes testified sometime on Wednesday and yesterday. Six of the counts which I will allow you to consider in the case of Mr. Rottenberg personally and seven of those which I will allow you to consider in the case of the corporation, refer to transactions, acts as to which Mr. Gordon testified. Now the transactions as to which Mr. Scappini testified occurred on January 2, January 5 and January 14 and 19th. Those as to which Mr. Kepnes testified occurred on December 18, January 7, January 14 and January 15. Those as to which Mr. Gordon testified include those transactions on December 24, December 28, January 2, January 4, January 7 and January 8, and in the case of the corporation also the transaction of December 17. Now when I say that those transactions occurred on that date, I did not mean to say that you must find that they occurred on that date. If I had spoken to you somewhat more clearly, I would have said that these are the dates on which the witnesses allege that the transactions occurred. Now you will recall that each of these three witnesses, Mr. Scappini, Mr. Kepnes and Mr. Gordon testified that on some of the transactions but not all of them, Mr. Rottenberg actually participated in the transactions. Mr. Scappini testified that on the transaction of January 5 and January 14 Mr. Rottenberg individually participated. Mr. Kepnes testified that on the transaction of December 17, Mr. Rottenberg participated. Mr. Gordon testified that on December 24 Mr. Rottenberg personally participated. Now, I do not mean to imply that Mr. Rottenberg could be found guilty only on the transactions on which he personally participated. He may have

made it plain or he may not have made it plain, it is up to you to decide, that the acts taken by the corporation in connection with these matters and the acts taken by Mr. Miller, were taken on his behalf and that he directed it or acquiesced to it. You will have to decide for yourselves as to whether or not Mr. Rottenberg participated in any transaction that was unlawful, whether he did so wilfully and if so what were those transactions. Now, I hope that you will examine carefully count by count the indictments as they go to you. You will have with you in the jury room the indictments covering the cases of the two defendants who are now on trial, Benjamin Rottenberg Co., Inc., Benjamin Rottenberg personally. You will also have in your jury room all the exhibits in this case including an exhibit which will be numbered (E) which will show what both the defendants and the Government agree are the correct ceiling prices for each of the transactions which is covered by the count that you are to consider. Merely for the purposes of the record and without any thought that any one of you will remember these ceiling prices, I am going to read what the ceiling prices for each of the counts was and you will have an actual list in your jury room repeating exactly what I am now saying.

In count 1, the ceiling price was $42.62 for rumps and rounds or $85.25 for hinds; in count 3, the celing price was $438.03; in count 4, the ceiling price was $255.02; in count 5 the ceiling price was $82.75; in count 9 the ceiling price was $258.88; in count 10 the ceiling price was $166.87; in count 11 the ceiling price was $229.77; in count 12 the ceiling price was $242.65; in count 14 the ceiling price was $80.80; in count 15 the ceiling price was $145.24; in count 16 the ceiling price was $205.75; in count 17 the ceiling price was $179.74; in count 18 the ceiling price was $36.86; in count 19 the ceiling price was $242.36; count 20 the ceiling price was $130.28.

Now, before I conclude I should like to ask counsel if they have anything to which they want to call my attention.

Mr. Foreman, Gentlemen, the counsels for the defense and the Government have drawn to my attention certain points which they would like me to call to your attention. In the first place, I indicated that Mr. Rottenberg was a large stockholder in the corporation. There is no evidence one way or the other as to how large a stockholder he is. The question is whether he really wilfully, through the use of the corporate device, violated the regulation and you can take into account the conversations which were testified to, or you can ignore them if you please. The question of fact is for you. Now the parties have drawn to my attention the fact that some of the transactions involve one invoice and two checks and some involve one invoice, one check and one cash payment. Particularly the transactions to which Mr. Gordon testified this morning were of the latter type. Now if you, when you get to the jury room find that there are not two checks for each transaction, you are entitled to take into account the testimony which explained the fact that there was one check and one invoice. I am not suggesting that you are bound to believe any one of the invoices. You can disbelieve all of them if you please to do so. Now it also has been called to my attention with respect to the first transaction that Mr. Scappini discussed with his testimony, the transaction covered in count number 1, the defendants claim that there are other invoices besides the invoice which was introduced by the Government as an exhibit and those other invoices account for a substantial part of the discrepancy when the checks were passed from Mr. Scappini to the corporation and the invoice which the Government offered. You may or may not believe that. That is a question for you gentlemen. I would not want to give you the impression by saying that that you are free to believe that you can act in careless disregard of your oath. You are sworn to do justice in this case and not to act capriciously but you have a reasonable latitude in determining for yourselves the credibility of the witnesses. You are entitled to weigh the facts and if you apply the law that I have given you, the facts as you have heard them throughout the case, you will remember that this

being a criminal proceeding, the Government has the burden of proof and that if your mind is in equilibrium so that you cannot decide whether there is innocence or guilt, you are bound under those circumstances to turn the verdict for the defendant. But of course, the duty of the Government does not go beyond proving their case beyond a reasonable doubt. You are to bear in mind that rule. Now when you retire, to the jury room to consider your verdict, you will realize that you are engaged in one of the most solemn undertakings which any man can be called upon to perform in civil life, the trial of a person for a serious crime. As I have indicated to you, you will have to return a verdict on some of the items for the defendants. I shall direct you now to return a verdict for the corporate defendant on counts 2, 6, 7, 8 and 13, and for the individual defendant on counts 2, 6, 7, 8, 13, and 14. As to the other counts, you will consider them and return your verdict acting as I suppose you all know, unanimously. No conviction can be based on less than a unanimous vote but each count is to be considered separately, Mr. Foreman, and you will be supplied by the clerk with the list of counts on which I have directed verdicts for the defendants, and you will take into consideration only the other counts, and you will proceed count by count making certain to apply the rule of burden of proof as I have indicated.

Also in order to avoid any question, let me repeat that Exhibit 2(e) one list of prices which I will give you to take to the jury room are ceiling prices, that is to say, they are the maximum prices which may lawfully have been charged under Regulation Number 169, as amended. And I cannot see how there can be any confusion to the point, since the list was prepared by the Government and starts with the words, "ceiling price". They seem to think I have not made that clear, and so I repeat it. Now I also want your attention to one fact which the defendants have requested me to draw to your attention. Mr. Rottenberg did not personally take the stand. He is not required to do so. And I am

by statute and decision required to call to your attention the fact when requested to call it to your attention, that his failure to take the stand is not to be construed against him. Is there anything else?

Mr. MacCarthy: Nothing else, your Honor.

Mr. Bacchus: Nothing else.

On March 10, 1943, before sentence, the defendants presented motions for a new trial and offered to show from statements made by the price administrator that Revised Maximum Price Regulation No. 169 as amended did not follow the provisions of Emergency Price Control Act of 1942 as amended, were unreasonable and arbitrary and, therefore, might be regarded as violating due process of law. The court denied the motions for a new trial on the ground that the Emergency Price Control Act of 1942 prevents the court from considering the alleged invalidity of a regulation. The defendants duly claimed exceptions to the rejection of the offer and the denial of said motions.

The defendants being aggrieved by the denial of each of their motions to quash the indictment as a whole and to each count thereof, the denial of each amended motion to quash the indictment by the admission of evidence and the exclusion of their offer of proof and other evidence, by the denial of their motion to dismiss count 1 on the ground of variance, by the rulings and refusals to rule as requested, by the denial of their motions in arrest of judgment and motions for a new trial, now present this, their bill of exceptions, and pray that the same may be allowed.

BENJAMIN ROTTENBERG,
B. ROTTENBERG CO., INC.,
by their Attorneys,
LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS.

On the same day the foregoing bill of exceptions is allowed by the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting.

DEFENDANT'S NOTICE OF APPEAL

[Filed March 15, 1943.]

Name and address of defendant-appellant:

Benjamin Rottenberg, 78 Wallingford Road, Brighton, Mass.

Name and address of defendant-appellant's attorneys:

William H. Lewis, Esquire, 294 Washington St., Boston, Mass.

John H. Backus, Esquire and Leonard Poretsky, Esquire, 6 Beacon Street, Boston, Mass.

Offense:

Wilfully, unlawfully and knowingly violating Section (4A) of the Emergency Price Control Act of 1942 as amended, in that the defendant sold and delivered wholesale cuts of beef to Morris Kepnes and others at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended.

Date of judgment:

March 10, 1943.

Brief description of judgment or sentence:

The defendant-appellant was sentenced to confinement for six months in such institution as the Attorney-General of the United States shall designate, and to pay a fine of ($1,000) one thousand dollars.

Upon application by defendant-appellant, defendant-appellant was admitted to bail pending his appeal to the United States Circuit Court of Appeals for the First Circuit, from the Judgment of conviction herein.

I, the above-named defendant-appellant, hereby appeal to the United States Circuit Court of Appeals for the First Circuit from the judgment above-mentioned on the grounds set forth below.

Dated at Boston, Massachusetts this fifteenth day of March, 1943.

BENJAMIN ROTTENBERG,
LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Defendant-Appellant.

GROUNDS OF APPEAL: The defendant-appellant alleges the court erred in the following:

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendant-appellant objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

(a) In admitting into evidence a series of checks payable to the order of cash without any evidence that the checks or proceeds thereof went through the hands of the defendant-appellant.

(b) By denying the defendant-appellant the right to introduce evidence tending to show that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

(c) By rejecting the offer of proof of defendant-appellant in substantiation of his claim that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

4. The court erred in denying the defendant-appellant's renewal of amended motion to quash the indictment.

5. The court erred in denying the defendant-appellant's motion to direct a verdict on count 1 of the indictment on the ground of variance.

6. The court erred in denying the defendant-appellant's motion to instruct the jury to return a verdict of not guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 15, 16, 17, 18, 19 and 20 of the indictment.

7. The court erred in denying the defendant-appellant's request for rulings numbered 17 to 33, inclusive.

8. The court erred in denying the defendant-appellant's motion in arrest of judgment.

9. The court erred in denying the defendant-appellant's motion for a new trial on the ground of newly discovered evidence.

10. The appeal will be based on additional errors set forth in detail in the assignment of errors.

UNITED STATES OF AMERICA
DISTRICT OF MASSACHUSETTS, ss.

Boston, Mass., March 15, 1943.

Pursuant hereunto, I have this day served on Edmund J. Brandon, United States Attorney, at Boston, in said district, a true and attested copy of this notice of appeal in hand at 3:00 P.M.E.W.T.

J. HENRY GOGUEN, *U. S. Marshal,*
By JOHN J. HARVEY,
Deputy U. S. Marshal.

[Ret'd into court 3/17/43.]

ASSIGNMENT OF ERRORS.

[Filed in No. 16074 and 16075 on May 6, 1943.]

The defendants- appellants allege that the court below erred in its orders, decrees, rulings and instructions and assign as errors the following:

1. The court erred in denying the defendants-appellants' motion to quash the indictment.

2. The court erred in denying the defendants-appellants' amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendants-appellants objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

(a) In ruling that the defendants-appellants had no right

to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169 as amended is arbitrary and capricious.

(b) In rejecting the offer of proof of the defendants-appellants in substantiation of their claim that Revised Maximum Price Regulation No. 169 as amended is arbitrary and capricious.

4. The court erred in denying the defendants- appellants' motion to direct a verdict on count 1 of the indictment on the ground of variance.

5. The court erred in denying the defendants-appellants' requests for rulings numbered 17 to 33 inclusive as more specifically set forth in the bill of exceptions.

6. The court erred in denying the defendants-appellants' motion in arrest of judgment.

7. The court erred in denying the defendants-appellants' motion for a new trial on the ground of newly-discovered evidence.

BENJAMIN ROTTENBERG,
B. ROTTENBERG CO., INC.,
by their Attorneys,
WILLIAM H. LEWIS,
JOHN H. BACKUS,
LEONARD PORETSKY.

No 16075, CRIMINAL,

THE UNITED STATES, BY INDICTMENT,

v.

B. ROTTENBERG CO., INC.

The indictment in this cause is presented by the grand jury at the present December Term of this court, 1942, when on February 24, 1943, the Honorable George C. Sweeney, District Judge, sitting, the said defendant, B. Rottenberg Co., Inc., a corporation, is set to the bar, and the reading of the indictment being waived, says by Benjamin Rottenberg, its president and attorney-in-fact, that thereof the corporation is not guilty.

At the same term the defendant on March 1, 1943, files a motion to quash the indictment, which on the same day comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and after argument thereon is denied.

At the same term on March 3, 1943, the defendant files a motion to amend his motion to quash, which on the same day comes on for hearing before the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and is denied if the court has jurisdiction so to do.

On the same day, it is ordered by the court, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, that this indictment and indictment No. 16074, United States *v.* B. Rottenberg, be tried together.

On the same day the defendant is set to the bar to be tried, the Honorable Charles E. Wyzanski, Jr., District Judge, sitting, and a jury is duly empanelled and sworn to try the issue, videlicit, Benjamin Knudson, Jr., Foreman, Milford F. Daniels, Eugene T. Ricketson, Don Allen Rogers, Thomas P. Smith, William H. Manning, G. Lane Goss, John A. McGowan, Frank B. Howland, Charles F. Breed, Thomas R. Brown, Thomas C. Hoover.

This cause, together with cause numbered 16074 comes on for trial on the pleadings and evidence on the third, fourth, and fifth days of March, 1943.

On the fifth day of March, 1943, at the close of the evidence, the defendant renews its motion to quash the indictment and its amendment thereof, and upon consideration the motion is denied by the court.

On the same day the defendant files a motion for directed verdict on counts 1 and 2 of the indictment on the ground of variance, which the court grants as to count 2 of the indictment and denies as to count 1.

On the same day defendant files a motion for directed verdict on all of the counts of the indictment, which is granted as to counts 2, 6, 7, 8, and 13, and denied as to the remaining counts.

This cause is thereupon committed to the jury, who, after hearing all matters and things concerning the same, return their verdict therein and upon oath say that thereof the defendant is guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20, and that by direction of the court upon counts 2, 6, 7, 8, and 13 the defendant is not guilty.

Thereupon, on March 9, 1943, the defendant files a motion in arrest of judgment, which the court, on March 10, 1943, after hearing denies. On said March 10, the defendant files a motion for new trial which the court, after consideration, denies. On the same day the following Judgment is entered:

JUDGMENT.

March 10, 1943.

On this tenth day of March, 1943, came the United States Attorney, and the defendant B. Rottenberg Co. Inc., a corporation appearing in proper person, and by Benjamin Rottenberg, its president, and by counsel, and,

The defendants having been convicted on verdict of guilty of the offense charged in counts 1, 3, 4, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, and 20 in the indictment in the above entitled cause, to wit: Violation of Revised Maximum Price Regulation No. 169, as amended, of the Emergency Price Control Act of 1942, as amended (Public Law 421, 77th Congress), approved January 30,

1942; it is by the court ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby sentenced to pay a fine of one thousand (1000) dollars.

CHARLES E. WYZANSKI, JR., *Judge.*

[Pursuant to stipulation, the indictment, the defendant's motion to quash, the defendant's motion to amend the motion to quash, the defendant's motion for directed verdict as to counts 1 and 2 on the ground of variance, the defendant's motion in arrest of judgment, and the defendant's motion for new trial are not here reproduced, as the indictment and the several motions are of like effect as those in Criminal No. 16074. One bill of exceptions and one assignment of errors were filed, entitled in both Criminal 16074 and 16075. They are reproduced in the record in Criminal 16074. JAMES S. ALLEN, *Clerk.*]

DEFENDANT'S NOTICE OF APPEAL

[Filed March 15, 1943.]

Name and Address of Defendant-appellant:

B. Rottenberg Co. Inc., 111 Blacksone St., Boston, Mass.

Name and Address of Defendant-appellant's attorneys:

William H. Lewis, Esquire, 294 Washington St., Boston, Mass.
John H. Backus, Esquire and Leonard Poretsky, Esquire,
6 Beacon Street, Boston, Mass.

Offense:

Wilfully, unlawfully and knowingly violating Section (4A) of the Emeregncy Price Control Act of 1942 as amended, in that the defendant sold and delivered wholesale cuts of beef to Morris Kepnes and others at prices higher than the maximum prices as determined under Section 1364.451 of Revised Maximum Price Regulation No. 169 as amended.

Date of judgment:

March 10, 1943.

Brief description of judgment or sentence:

The defendant-appellant was sentenced to pay a fine of one thousand dollars ($1,000).

Upon application by defendant-appellant, execution of sentence was stayed pending its appeal to the United States Circuit Court of Appeals for the First Circuit, from the judgment of conviction herein.

The above-named defendant-appellant corporation hereby appeals to the United States Circuit Court of Appeals for the First Circuit, from the judgment above-mentioned on the grounds set forth below.

Dated at Boston, Massachusetts this fifteenth day of March, 1943.

B. ROTTENBERG CO. INC.,
by BENJAMIN ROTTENBERG, *President.*
LEONARD PORETSKY,
JOHN H. BACKUS,
WILLIAM H. LEWIS,
Attorneys for Defendant-Appellant.

GROUNDS OF APPEAL: The defendant-appellant alleges the court erred in the following:

1. The court erred in denying the defendant-appellant's motion to quash the indictment.

2. The court erred in denying the defendant-appellant's amendment to motion to quash the indictment.

3. The court erred in rulings on the admission or rejection of evidence to which the defendant-appellant objected and took exceptions during the trial of this cause, and the specific evidence and the objections thereto are as follows, to wit:

(a) By denying the defendant-appellant the right to introduce evidence tending to prove that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

(b) By rejecting the offer of proof of defendant-appellant in substantiation of its claim that Revised Maximum Price Regulation No. 169 as amended, is arbitrary and capricious.

4. The court erred in denying the defendant-appellant's renewal of amended motion to quash the indictment.

5. The court erred in denying the defendant-appellant's motion to direct a verdict on count 1 of the indictment on the ground of variance.

6. The court erred in denying the defendant-appellant's motion to instruct the jury to return a verdict of not guilty on counts 1, 3, 4, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20 of the indictment.

7. The court erred in denying the defendant-appellant's request for rulings numbered 17 to 33 inclusive.

8. The court erred in denying the defendant-appellant's motion in arrest of judgment.

9. The court erred in denying the defendant-appellant's motion for a new trial on the ground of newly discovered evidence.

10. The appeal will be based on additional errors set forth in detail in the assignment of errors.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

Boston, Mass., March 15, 1943.

Pursuant hereunto, I have this day served on Edmund J. Brandon, United States Attorney, at Boston, in said district, a true and attested copy of this notice of appeal in hand at 3:00 P.M. E.W.T.

J. HENRY GOGUEN, *U. S. Marshal,*
by JOHN J. HARVEY,
Deputy U. S. Marshal.

Ret. into court 3/17/43.

STIPULATION.

[Filed May 7, 1943.]

Whereas the pleadings and motions filed in the above-captioned cause are duplications of those filed in United States *v.* Benjamin Rottenberg, No. 16074 of this court, it is hereby agreed

and stipulated that such pleadings and motions as are herein enumerated and filed in No. 16074 shall have equal application to this defendant upon its appeal and there need not be printed in the record the following pleadings and motions of this defendant:

(a) The indictment;
(b) Defendant's motion to quash;
(c) Defendant's amendment to motion to quash;
(d) Motion for directed verdict of not guilty as to counts 1 and 2 on ground of variance;
(e) Motion in arrest of judgment;
(f) Motion for new trial;
(g) Opinion in United States *v.* Slobodkin et al. and United States *v.* B. Rottenberg Co. Inc. et al, Criminal Nos. 16058, 16059 and 16063.

EDMUND J. BRANDON,
United States Attorney.
WM. H. LEWIS, L.P.,
JOHN H. BACKUS, L.P.,
LEONARD PORETSKY, L.P.,
Counsel for the Defendant.

ORDER OF CIRCUIT COURT OF APPEALS CONSOLIDATING CRIMINAL 16074 AND CRIMINAL 16075.

March 26, 1943.

Upon motion, It is ordered that the appeal herein be consolidated and docketed as a single case.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MASSACHUSETTS.

Criminal No. 16058.

United States *v.* Jacob Slobodkin.

Criminal No. 16059.

United States *v.* J. Slobodkin Co.

Criminal No. 16063.

United States *v.* B. Rottenberg Co. Inc. et al.

MEMORANDUM

March 2, 1943.

WYZANSKI, *D.J.*

Criminal No. 16058.

In United States *v.* Jacob Slobodkin, Criminal No. 16058, paragraph 1 of the defendant's motion to quash raises the objection that the indictment is vague. That objection is overruled because the court finds the indictment sufficiently certain. Paragraphs 2 through 5 of the defendant's motion allege that the Emergency Price Control Act of 1942 itself, (not, be it observed, any specific regulation thereunder) is invalid under the United States Constitution for these reasons: in violation of Article I of the United States Constitution, Congress delegated legislative power to the Price Administrator (¶ 2); in violation of Amendment V, the Act deprives the defendant of his property and interferes with his liberty of contract (¶ 3); and, in violation of Amendment V, the Act deprives the defendant of his liberty and his property by authorizing this court to impose a sentence of imprisonment and fines without permitting the defendant to question in this court the validity of the Act and the regulations thereunder (¶ 4 and 5). The points made in paragraphs 2 and 3 are overruled for these reasons: first, no one denies that this court in passing upon an indictment laid under the Emergency Price Control Act has the power to consider the validity of such *statutory* provisions as are applied in the indictment; and second, having the power to pass upon the validity of the statutory pro-

visions here applied, this court concludes that, upon the showing so far made by the defendant, those provisions do not delegate legislative power in violation of Article I of the United States Constitution and do not regulate property or contracts in violation of Amendment V. As to the points made in paragraphs 4 and 5 they are overruled on the ground that they are moot. This court has not been presented with an issue as to the validity of any regulation. Accordingly, *the motion to quash the indictment is denied.* There is no need at this time to consider the defendant's motion to suppress evidence.

Criminal No. 16059.

In United States *v.* J. Slobodkin Company, Criminal No. 16059, the corporate defendant's motion to quash differs from the individual defendant's motion in Criminal No. 16058 only by omitting any allegation of a possible unlawful imprisonment. *The motion to quash the indictment is denied.*

Criminal No. 16063.

In United States *v.* B. Bottenberg Co., Inc. et al., Criminal No. 16063, the defendants have filed pleas in abatement and a motion to quash.

Although paragraph 4 of the corporation's plea in abatement refers to certain prices as being "unfair and inequitable", the pleas do not point with particularity to any alleged constitutional or statutory infirmity of any regulation of the price administrator. Instead, the pleas place particular emphasis on the two points (1) that the indictments lack the allegation that the overt act occurred in the United States and (2) that the pleaders acquired immunity from prosecution when the corporate records were, in compliance with a subpoena, produced before the grand jury. Both the first (*Daily* v. *United States,* 152 U.S. 539, 547; *Hyde* v. *Shine,* 199 U.S. 66, 77) and second (*Wilson* v. *United States,* 221 U.S. 361, 372–374) points are without merit *The several pleas in abatement are overruled.*

The motion to quash is a prolix document which in twenty-five

numbered paragraphs challenges the indictment principally on the grounds that (1) it does not set forth sufficient facts to charge a crime or to apprize the defendant of the crime, if any, with which he is charged (¶ 1–3, 17–25); (2) it sets forth more than one crime in one count (¶ 5–6); (3) the Emergency Price Control Act of 1942 upon which the indictment is based is invalid because it delegates legislative power in violation of Article I of the United States Constitution (¶ 7–8, 16); and (4) the regulations upon which the indictment is based are invalid because they are exercises of legislative power, are penal in nature, are unsupported by necessary determinations of fact, and were formulated by methods of procedure which violated the Fifth Amendment (¶ 9–15). The first two grounds were disposed of from the bench during argument and the third ground falls for the reason set forth in *Slobodkin*'s case, *supra*. The fourth ground challenges, albeit not concisely or with precision, the regulation on which the indictment is based. Thus the defendants have moved to quash the indictment on the ground that it is founded upon a regulation which, in view of the circumstances of its adoption (and perhaps they also mean in view of the circumstances of its application,) is invalid under the Emergency Price Control Act of 1942 and is invalid under the due process clause of the Fifth Amendment to the Constitution. The Government has replied that under § 204 (d) of the Emergency Price Control Act of 1942, c. 26, 56 Stat. 23, 31, U.S.C. Ti. 50 § 924 (d), this court is without jurisdiction at any stage in these proceedings to entertain a defense based on an asserted statutory or constitutional invalidity of the regulation.

There is a short answer to this fourth challenge. The defendant's motion to quash is the equivalent of a demurrer. It is not and could not be supported by evidence. It merely tests the indictment, the underlying regulation and the underlying statute as each of them appears upon its face. It follows that under ordinary principles of pleading and criminal procedure, and leaving aside any question of § 204 (d), the defendants

cannot succeed on the fourth ground of their motion unless such parts of Revised Maximum Price Regulation No. 169 [C.C.H. War Law Service ¶ 43,369] as underlie the indictment are invalid upon their face, apart from extrinsic considerations such as the procedure which the administrator followed in formulating the regulation, the evidence upon which he acted, the arbitrary or lack of arbitrary quality of the regulation in the light of the surrounding circumstances of the industry, and the arbitrary or lack of arbitrary quality of the application of the regulation to these defendants. Viewed in this limited aspect, the fourth ground of the defendants' motion is plainly without merit. On its face the regulation complies with all statutory and constitutional requirements. If there be defects in the regulation they are not patent. Accordingly, they are not susceptible of determination on a demurrer or motion to quash.

The defendants, however, have indicated that they intend in the course of the trial to present evidence to show that the administrator acted capriciously in formulating the regulation and that the regulation is capricious in its application to the defendants, and so on both counts violates the due process clause of the Fifth Amendment. If this is the position that the defendants take they, of course, must make a proffer of testimony at the trial when I shall rule upon it. Nothing that I say herein excuses them from that procedural step.

Without excusing such proffer, and solely in connection with the motion now pending before me, I should add that my conclusion adverse to the defendants, on the fourth ground of their motion, rests not only on the short answer already given but also on § 204 (d) of the Emergency Price Control Act. In connection with this latter and alternative basis for my conclusion I have considered two questions: whether § 204 (d) purports to go so far as the Government contends; and if so, whether it violates the Fifth Amendment. Since the case is ready for trial, I shall merely state my reasons briefly, without seeking to document my opinion with the usual citations.

The initial question is one of statutory construction. Unfortu-

nately I have not in the 24 hours available to me had access to the legislative history, including committee reports and Congressional debates except as summarized in Note 55 Harv. L. Rev. 477, 492-493. I therefore, am able now to consider only the text of the Act. It shows that criminal prosecutions are provided for in one section, and review of administrative orders in another section. It is in the latter section that there appears sub-section 204 (d) upon which the Government's argument is based. No one would deny that that subsection purports to preclude a United States District Court from entertaining a suit in equity to set aside a regulation. The draftsman has used apt and familiar words from the Chancellor's vocabulary, "to stay, restrain, enjoin or set aside". But since he has not used any terms peculiar to criminal procedure, it might be argued that criminal cases were not within the ban. However, the statement in the Act is unusually broad. It is provided that no District Court "shall have jurisdiction or power to consider the validity of any regulation". Even though, strictly speaking, in a criminal case the District Court never considers the validity of a regulation, but merely the validity of the indictment founded upon the regulation, the language seems to include a criminal prosecution. This is clearer when it is recalled that, strictly speaking, in a suit in equity the Chancellor considers not the validity of a regulation, but the validity of its application to the complainant. Therefore, I conclude that the statute purports to preclude this court from considering the statutory and constitutional validity of a regulation under the Act; and I must next consider whether such a statute is constitutional.

The constitutional question is whether it comports with the due process guarantee of the Fifth Amendment for Congress to provide that in a criminal prosecution for violation of a regulation under the Emergency Price Control Act of 1942 the defendant may not be heard on the issue of the statutory and constitutional validitiy of that regulation.

In approaching this question it is important to distinguish two different types of asserted invalidity. A regulation might, in form

or in substance, be invalid on its face; or, though fair on its face, it might be invalid because of the circumstances of its adoption or application. This distinction is familiar in the area of administrative law. *Smith* v. *Cahoon*, 283 U.S. 353, 362; *Lovell* v. *Griffin*, 303 U.S. 444, 452-453. Illustrative of the former type of invalidity would be a regulation establishing different prices for persons of white than for persons of black color; or a regulation which, though it recited compliance with the Act, in fact governed a subject, such as an income tax, obviously foreign to the Act. Illustrative of the latter type of invalidity would be a regulation fair on its face but adopted without whatever procedural formalities may be requisite; or a regulation establishing classifications which in view of the surrounding circumstances are arbitrary and capricious.

In the case at bar the underlying regulation is plainly not infected with the first type of invalidity. It is therefore necessary for me to consider only whether it is unconstitutional to preclude the defendants from raising in a criminal prosecution the issue that the regulation for the violation of which they are prosecuted is, though fair on its face, invalid because of the circumstances under which it was adopted and has been applied to them.

Before discussing that point it is important to observe that the Emergency Price Control Act of 1942 provides in §§ 203 and 204, 56 Stat. 31, U.S.C. Ti. 50 § 923 and 924, that any person subject to any provision of a maximum price regulation may file a protest with the administrator within 60 days after issuance of the regulation (or later if the grounds of protest arose thereafter), and may, in the event of a determination unfavorable to him, seek review by the Emergency Court of Appeals and, on certiorari, by the Supreme Court of the United States.

The indictment charges these defendants with having engaged in violations of Revised Price Regulation No. 169 within 60 days of December 10, 1942, the date the regulation was issued [C.C.H. War Law Service, p. 44, 409–3, note 1]. Thus, in their case at the

time they acted there was available a method for seeking administrative and judicial relief against the regulation if it caused them hardship. They might have filed a protest against the regulation and if the Administrator ultimately ruled against them, they had recourse to the Emergency Court of Appeals and the Supreme Court of the United States.

One other feature of the statute requires comment before the narrow scope of the constitutional question is sharply revealed. Under § 205 (b) of the Emergency Price Control Act of 1942, 56 Stat. 33, U.S.C. Ti. 50 § 925 (b) criminal sanctions are applicable only against a person "who wilfully violates" a regulation, order, or statutory provision. This means that there must be either a conscious violation or deliberate unwillingness to discover and obey the law.

Thus the precise question now presented is whether in the exercise of its war powers Congress can absolutely forbid the violation of a price regulation which, though it may have some hidden infirmity, was valid on its face, was known to the person regulated and at the time he violated it, was susceptible of review at his instance in designated administrative and judicial tribunals.

The question is not so novel as the defendants suppose. It is well settled that where a licensing ordinance, valid on its face, prohibits certain conduct unless the person has a license, one who without a license engages in that conduct can be criminally prosecuted without being allowed to show that the application for a license would have been unavailing. *Lehon* v. *Alabama*, 242 U.S. 53, 56; *Hall* v. *Geiger Jones*, 242 U.S. 539, 554, especially lines 22–24; *Bradley* v. *City of Richmond*, 227 U.S. 477, 485. Cf. *Highland Farms Dairy Inc.* v. *Agnew*, 300 U.S. 608, 616-617; *Bourjois Inc.* v. *Chapman*, 301 U.S. 183, 188. In short, the individual is given the choice of securing a license, or staying out of the occupation, or, before he acts, seeking a review in the civil courts of the licensing authority's refusal to issue him a license. Likewise in the case at bar the defendants are given the choice of complying with the

regulation, or not engaging in the regulated activity, or, before they act, petitioning the appropriate civil tribunals for a modification of or exception from the regulation.

Indeed, there is an even closer parallel to the case at bar than the licensing cases. Congress can establish a rate-making body, such as the Interstate Commerce Commission, and, under criminal sanctions, require persons to comply with orders of that agency until they are set aside. *Texas and Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 440–441; *Lehigh Valley R. Co.* v. *United States*, 188 Fed. 879 (C.C.A. 3) *United States* v. *Vacuum Oil Co.*, 158 Fed. 536 (W.D. N.Y.). If, a defendant charged with criminal violation of a railroad rate order cannot show in his defense that the rate is discriminatory or unreasonable, then it is no departure from accepted principles to preclude a defendant charged with criminal violation of an OPA regulation from showing that the formulation, operation or application of the regulation is arbitrary.

In short, I conclude that as here applied paragraph 204 (d) of the Emergency Price Control Act of 1942 is constitutional. In time of war and as an integral part of a system of preventing inflation, Congress can forbid the deliberate violation of a price regulation which is valid on its face, even though there may be hidden defects in the formulation or operation of the regulation or its application to particular persons. If a person subject to the regulation believes that such hidden defects exist, he must assume the burden of drawing them to the attention of the administrator and, if desired, the Emergency Court of Appeals and the Supreme Court of the United States. Until those tribunals have acted upon his plea, the individual must either act in accordance with the regulation or not act at all. Congress has determined that such inconvenience and delay as are necessarily involved in securing an administrative change in or exemption from a price, rent, rationing or like regulation shall be borne by the person who believes his case exceptional, and that in the meantime the community at

large shall have the benefit of compliance with the regulation. *The motion to quash is denied.*

CHARLES E. WYZANSKI, JR.,
United States District Judge.

March 2, 1943.

DISTRICT COURT OF THE UNITED STATES.
DISTRICT OF MASSACHUSETTS.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the record on appeal in the causes entitled respectively

No. 16074, CRIMINAL,

THE UNITED STATES, by Indictment,

v.

BENJAMIN ROTTENBERG, Defendant,

No. 16075. CRIMINAL,

THE UNITED STATES, by Indictment,

v.

B. ROTTENBERG CO., INC., Defendant,

in said District Court determined.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this seventh day of June, A.D. 1943.

[SEAL] JAMES S. ALLEN, *Clerk.*

[fol. 68] Proceedings in Circuit Court of Appeals

On March 26, 1943, duplicate notices of appeal, statements of docket entries, and motion to consolidate were filed, and an order of consolidation was entered.

Thereafter, to wit, on June 29, 1943, the following stipulation was filed:

STIPULATION

In the above-entitled matter, the Bill of Exceptions does not show the ground upon which the defendants' motions for new trial were denied and such omission was due to accident or error.

It is hereby agreed and stipulated that the motions for a new trial (R. 25-26) were denied upon the ground that Section 204 (d) of the Emergency Price Control Act prevented the Court from considering the alleged invalidity of the Regulation.

(S.) William H. Lewis, John H. Backus, Leonard Poretsky, Counsel for Defendants. (S.) Edmund J. Brandon, U. S. Attorney.

On the same day, to wit, June 29, 1943, this consolidated cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on August 23, 1943, the following Opinion of the Court was filed:

[fol. 69] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1942

No. 3885

BENJAMIN ROTTENBERG, et al., Defendants, Appellants,

v.

UNITED STATES OF AMERICA, Appellee

No. 3892

ALBERT YAKUS, Defendant, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the District Court of the United States for the District of Massachusetts

Before MAGRUDER, MAHONEY and WOODBURY, JJ.

Leonard Poretsky, John H. Backus, William H. Lewis, for Benjamin Rottenberg, et al.

Leonard Poretsky, Francis P. Garland, Joseph Kruger, for Albert Yakus.

Robert L. Wright, Special Assistant to the Attorney General.

Edmund J. Brandon, U. S. Attorney; William T. McCarthy, Joseph J. Gottlieb, Assistant U. S. Attorneys, for United States of America.

OPINION OF THE COURT—August 23, 1943

MAGRUDER, J.:

In these criminal prosecutions for violations of § 4(a) [fol. 70] of the Emergency Price Control Act (56 Stat. 28) by making sales at prices in excess of those prescribed by an applicable price regulation, the question is squarely presented whether, or to what extent, the trial court may entertain a defense based upon the alleged invalidity of the regulation. The point was left open in *Lockerty* v. *Phillips*, — U. S. —, decided May 10, 1943.

No. 3885 embraces two indictments, one against Rottenberg, who was president and treasurer of B. Rottenberg Co., Inc., and one against the corporation. The two indictments were consolidated for trial and are here on a consolidated appeal. Each defendant was convicted on several counts of making sales of wholesale cuts of beef in December, 1942, and January, 1943, at prices higher than the maximum prices as determined under Revised Maximum Price Regulation No. 169,[1] in willful violation of § 4(a) of the Act. Sentence of six months in jail and a fine of $1,000 was imposed upon the individual defendant. The corporate defendant was fined $1,000.

No. 3892 embraces a similar indictment against Yakus, who was president of the Brighton Packing Company. He was convicted on three counts of making sales of wholesale beef cuts in December, 1942, and January, 1943, at prices higher than the maximum prices established by the aforesaid regulation and was sentenced to jail for six months and fined $1,000.

The cases were heard together on appeal in this court. They involve essentially the same questions, and hereafter in this opinion reference will be made only to the proceedings in Rottenberg's case.

---

[1] 7 F. R. 10,381. The regulation was issued December 10, 1942, to become effective December 16, 1942.

At various appropriate stages in the proceedings Rotten-
[fol. 71] berg challenged the constitutionality of the Emergency Price Control Act. The District Court upheld the Act.

The Government introduced sufficient evidence to warrant verdicts of guilty on all the counts which were submitted to the jury.

Rottenberg introduced no testimony except an offer of proof of detailed economic data designed to show that Revised Maximum Price Regulation No. 169 was arbitrary and capricious and failed to provide a fair and equitable margin of profit to slaughterers and wholesalers conducting their business in an efficient manner. The court declined to receive the offer of proof on the ground that § 204 of the Act deprived it of jurisdiction to entertain such a defense. Rottenberg duly took exception to this ruling, the correctness of which is the most serious question now before us.

There is first the inquiry whether the Act as a matter of interpretation precludes this sort of defense to the indictments now before us. If so, then we must decide whether it was competent for Congress so to provide "in a statute born of the exigencies of war." *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U. S. 4, 17 (1942).

On July 30, 1941, many months before our country was attacked at Pearl Harbor, the President transmitted to Congress a message setting forth the necessity of legislation to control prices. H. Doc. No. 332, 77th Cong., 1st Sess. He submitted figures to show that inflationary price rises were threatening to undermine our defense effort "unless we act decisively and without delay." After extended consideration the House passed on November 28, 1941, a bill to control prices and rents. H. R. 5990, 77th Cong., 1st Sess. This bill contained quite a different scheme for review of price regulations from what was ultimately enacted. In the first instance review was to be had before a Board of Adminis-
[fol. 72] trative Review; any person aggrieved by the decision of such board might petition for review in the appropriate circuit court of appeals. The bill contained no provision corresponding to that now found in § 204(d) of the Act upon which the court below relied in excluding the offer of proof.

On January 2, 1942, the Senate Committee on Banking and Currency reported out the House bill, with substantial

amendments, including the review provisions which eventually became law, and which we shall examine in detail later.

The Senate committee report (Sen. Rep. No. 931, 77th Cong., 2d Sess.) pointed out that the House bill had been passed before we entered the war and that the bill needed to be strengthened now that we were embarkd upon an "unlimited national mobilization in a war for survival." While the country was concerned with the danger of inflation even before December 7, 1941, "the pressures on the price structure, already enormous, will be multiplied" now that we are engaged in a world war. The committee pictured in vivid terms what would be the disastrous consequences of inflation by way of sapping our national strength and effort and morale. "Effective price control, under these circumstances, must no longer be delayed." The report added: "Price control which cannot be made effective is at least as bad as no price control at all. It will not stop inflation, and enables those who defy regulation to proceed at the expense of the buyers and sellers who unselfishly cooperate in the interests of the emergency."

The Emergency Price Control Act of 1942 became law on January 30, 1942.

Section 1(a) of the Act sets forth its purposes and declares that price and rent control are "necessary to the effective prosecution of the present war."

The temporary, emergency character of the legislation was emphasized by the provision in § 1(b) that the Act [fol. 73] "shall terminate on June 30, 1943", or upon such earlier date as the President by proclamation, or the Congress by concurrent resolution, may prescribe.[2]

Section 2(a) provides that whenever in the judgment of the Price Adminstrator the price or prices of a commodity or commodities have risen or threatened to rise to an extent or in a manner inconsistent with the purposes of the Act, "he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." In establishing any maximum price, he is directed, so far as practicable, to ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941, and to make adjustments for such

[2] This terminating date has since been extended to June 30, 1944. 56 Stat. 767.

relevant factors as he may determine to be of general applicability. The Administrator is also directed, so far as practicable, before issuing any price regulation, to consult with representative members of the industry affected. Further to assure that no price regulation would be issued without due consideration by the Administrator of the factors involved, it is required that every price regulation issued by him "shall be accompanied by a statement of the considerations involved in the issuance of such regulation". After a regulation is issued the Administrator is required, if requested by any substantial portion of the industry affected, to appoint an advisory committee truly representative of the industry with whom he shall advise and consult from time to time with respect to the regulation, the form thereof, and classifications, differentiations and adjustments therein. Under § 2(c) any price regulation "may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary and proper in order to effectuate the purposes of this Act."

[fol. 74]

Section 4(a) provides that it shall be unlawful "for any person to sell or deliver any commodity * * * in violation of any regulation or order under section 2, * * *." This subsection is implemented by § 205(b) which provides that any person "who willfully violates any provision of section 4 of this Act" shall, upon conviction thereof, be subject to a fine or imprisonment or both. In § 205(c) it is provided that "the district courts shall have jurisdiction of criminal proceedings for violation of section 4 of this Act."

Sections 203 and 204 provide in detail the procedure for administrative review, and ultimate court review, of price and rent regulations, first in a special court of the United States known as the Emergency Court of Appeals, and then in the Supreme Court, upon certiorari. This special court, created by § 204(c), consists of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. It is given the powers of a district court with respect to the jurisdiction conferred upon it, except that it "shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining in whole or in part, the effectiveness of any regulation or order issued under section 2."

Under § 203(a), within a period of sixty days after the issuance of any regulation under § 2, "any person subject to any provision of such regulation" may "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." Within thirty days after the filing of such protest "the Administrator shall either grant or deny such protest, in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in [fol. 75] connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

If the Administrator denies such protest, in whole or in part, any person aggrieved by such denial may within thirty days thereafter, under § 204(a), file a complaint with the Emergency Court of Appeals, specifying his objections and praying that the regulation protested be enjoined or set aside in whole or in part. Upon receipt of service of such complaint it is the Administrator's duty to certify and file with the court a transcript of such portions of the protest proceedings as are material to the complaint. The transcript shall include a statement setting forth, so far as practicable, "the economic data and other facts of which the Administrator has taken official notice." Upon the filing of such complaint "the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding." No objection to such regulation, and no evidence in support of any objection thereto, shall be considered by the court, "unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript." Appropriate provision is made for applications by either party for leave to adduce additional evidence.

Section 204(b) provides that no such regulation shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation "is not in accordance with law, or is arbitrary or capricious." The effectiveness of any such judgment by the Emergency Court "shall be postponed until the expiration of thirty days from the entry thereof", except that if petition for certiorari is filed with the Supreme Court

[fol. 76] within such thirty days, the effectiveness of such judgment "shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court."[3]

The particular provision of the Act upon which the controversy turns in the present cases is found in § 204(d) as follows:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation * * * issued under section 2 * * * and of any provision of any such regulation. * * * Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation * * *, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations * * * or any provision of any such regulation * * * or to restrain or enjoin the enforcement of any such provision."

Section 205 contains several subsections in aid of enforcing the Act. Subsection (a) authorizes the Administrator to make application to any appropriate court for an order enjoining violations of § 4. Subsections (b) and (c) contain the provisions for criminal prosecution already referred to. Subsection (d) refers to litigation between private parties in which some provision of the Act, or a regulation issued thereunder, may be involved. Subsection (e) [fol. 77] provides that a buyer of a commodity who has paid more than the applicable maximum price may, with some limitations, bring suit against the seller for treble damages

[3] With respect to this provision the report of the Senate committee states: "This 30-day period is necessary in order to prevent prices from rising without restraint while the Administrator is modifying or supplanting the regulation in accordance with the judgment of the court or preparing a petition for certiorari to the United States Supreme Court. If a petition for a writ of certiorari is filed with the Supreme Court within such 30 days, under the provisions of section 204(d), the effectiveness of such judgment is postponed until final disposition of the case by the Supreme Court." Sen. Rep. No. 931, 77th Cong., 2d Sess., p. 24.

in any court of competent jurisdiction. Subsection (f) contains detailed and carefully guarded licensing provisions.

It is the contention of appellants that since the provision of § 204(d), above quoted, is contained in a section of the Act prescribing a special procedure by which a person subject to a price regulation may invoke the judicial power to have the regulation set aside, it should be read as meaning no more than that this special statutory procedure is the only means by which such a person may maintain a suit directed to that end; in other words, that none of the regular courts shall have jurisdiction to entertain a suit by such person to set aside any provision of the Act or a regulation thereunder or to restrain the enforcement thereof.

This argument overlooks the breadth of the language in § 204(d). The subsection provides, affirmatively, that the Emergency Court of Appeals, and the Supreme Court on certiorari therefrom, "shall have exclusive jurisdiction to determine the validity of any regulation." Then follows the negative statement of the same idea, significantly expressed in three distinct clauses: Except as provided in § 204, (1) "no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation"; (2) "or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of the Act or of a regulation thereunder"; (3) "or to restrain or enjoin the enforcement of any such provision." (2) and (3) refer aptly to injunction suits brought by a person subject to a regulation. (1) is much broader and seems clearly enough to say that no other court shall have jurisdiction or power to consider the validity of any regulation, however the litigation may originate. Since this is a blanket provision it is natural that it is placed in a section which prescribes the [fol. 78] only procedure by which the validity of a regulation may be subjected to court review. It thus became unnecessary to write the same limitation into each of the subsections of § 205 dealing with the various methods of enforcement.

Our interpretation of § 204 (d) is confirmed by the legislative history, if confirmation were necessary. The report of the Senate Committee on Banking and Currency (Sen. Rep. No. 931, 77th Cong. 2d Sess.) states (p. 7):

"The Emergency Court is established in order to avoid the confusion which would result from conflicting decisions in

different circuits on the same regulations. It will also permit the expeditious consideration and disposition of problems arising under the statute by a court familiar with its provisions and operation."

And, again, in the same report (pp. 24-25), emphasizing the distinct clauses in the last sentence of § 204(d):

"Section 204(d) further provides expressly that no court, other than the Emergency Court and the Supreme Court, shall have jurisdiction or power to consider the validity, constitutional or otherwise, of any regulation or order issued under section 2. It also provides that no court, except as provided in section 204, shall have jurisdiction or power to stay, restrain, enjoin, or set aside (whether by declaratory judgment or otherwise) any provision of the bill authorizing the issuance of such regulation or order, or to restrain or enjoin the enforcement of any provision of any such regulation or order. Thus the bill provides for exclusive jurisdiction in the Emergency Court and in the Supreme Court to determine the validity of regulations or orders issued under section 2. Of course, the courts in which criminal or civil enforcement proceeding are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself."

It is thus clear that the limitations of § 204(d) were intended to apply not only to injunction suits brought by a person affected by a regulation, but also to enforcement proceedings, both criminal and civil, brought under § 205. Any court in which criminal or civil enforcement proceedings are brought may determine the constitutional [fol. 79] validity of the Act itself, but in such proceedings consideration of the validity of a regulation is precluded.

Section 4(d) provides: "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." Appellants, therefore, were not required to act, but, in effect, the Congressional command to them was that if they chose to act they must act in accordance with an outstanding price regulation until the same is set aside in proceedings directed to that end in accordance with the provisions of §§ 203 and 204.

It is contended that such a command constitutes a denial of due process of law in violation of the Fifth Amendment. We do not think that this is so.

It is beyond all doubt that Congress in the exercise of its war power may control prices as part of a war-time anti-inflation program. *United States* v. *Macintosh*, 283 U. S. 605, 622 (1931); *Taylor* v. *Brown*, United States Emergency Court of Appeals, July 15, 1943. This power is "a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation." *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U. S. 398, 426 (1934). The validity under the due process clause of the methods selected by Congress for effectuating price control cannot be judged apart from a consideration of the practical necessities of administration. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264, 299, 301 (1920). "The Constitution as a continuously operating charter of government does not demand the impossible or the impracticable." *Hirabayashi* v. *United States*, U. S. , June 21, 1943. In *Nebbia* v. *New York*, 291 U. S. 502, 539 (1934), the court said, "Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual [fol. 80] liberty." Since the war-time power of Congress to control prices includes the power to adopt such means to this end as might rationally be considered necessary for the effective administration of the regulatory program, the only question remaining to the courts, under the Fifth Amendment, is whether Congress had any rational basis for its judgment that administrative necessities in a scheme of nation-wide price regulation require that price regulations issued by the Administrator must be generally observed until the regulations are set aside pursuant to the orderly review procedure set forth in the Act. Nothing would seem to be gained by expressing the issue in more esoteric terms to disguise the non-technical nature of the judgment the courts are called upon to make under the Fifth Amendment.

It is common knowledge that the danger of runaway inflation was acute when Congress passed the Emergency Price Control Act. The Administrator had to move promptly, on the broadest possible front; he had to get out regulations covering great numbers of commodities, affecting a wide range of industries, the full comprehension of each of which is a lifetime study. He could not afford to be a perfectionist in getting the program started.

Congress was well aware that in this hectic enterprise the Administrator might unavoidably put out regulations without a full appreciation of the effect they might have on the delicate interrelations of our complicated economy or without having had brought to his attention particular situations in which a regulation as drawn would work unnecessary hardship or dislocations. Soldiers are expected to make the best fight they can with the facilities that are available, inadequate though they may be, and sometimes they have to carry on without full information on what they are up against. It was not to be expected that the Price Administrator would be any less conscientious and diligent in the fight he has to lead on the home front. It [fol. 81] was not to be anticipated that he would glory in being "arbitrary or capricious", or that he would be loathe to make needed changes or adjustments if it were shown to him that a regulation in actual operation was not "generally fair and equitable". He is at least as much interested as anybody else in the successful administration of his office.

Furthermore, the Administrator alone has power to recast regulations as circumstances may indicate the need. All that a court could do would be to strike down; it could not draft and put in force a substitute regulation. If a violator could procure an acquittal in a criminal case by convincing the particular district court or jury that the regulation is arbitrary or capricious or not generally fair and equitable, the Government could not appeal; and for practical purposes enforcement of the regulation in that district would be at an end. In other districts the regulation might be upheld. As the Government well says in its brief: "The sudden development of price disparities entirely unrelated to natural geographical differentials would disrupt normal market relationships. Commodities would tend to be drained off toward the area in which higher prices prevailed. Producers in low-price areas would be at a serious disadvantage in procuring goods at the price established by the regulations. The disruption would be the more acute because of wartime shortages in many commodities." The same damaging results would follow if the ordinary courts were empowered to set aside a regulation or grant injunctions against its enforcement. If some commodities thus got released from price control, even temporarily, the consequences might well be irretrievable, and,

our economy being all of a piece, pressures would develop on other commodities to break through their ceilings. Hence, even the Emergency Court of Appeals (which alone has been given power to set aside a regulation on grounds [fol. 82] not involving the constitutional validity of the Act itself) is not empowered to grant a stay pending the litigation.[4]

If in every proceeding, civil or criminal, to enforce compliance with the regulations, the Administrator had to present the mass of economic data which might be required to establish the validity of the regulation, and to try the issue *de novo* as against each defendant, his predominant occupation would become fighting litigation rather than fighting inflation.

In view of these considerations, it is easy to see why Congress chose the particular review procedure set forth in §§ 203 and 204. If a person subject to a regulation believes that it is not generally fair and equitable or causes avoidable hardships or dislocations, he must first make his protest to the Administrator, who is thus given the opportunity to reconsider any challenged provisions in the regulation in the light of further evidence or arguments which may be advanced by the protestant. The Administrator and his staff, the collective entity known as the Office of Price Administration, develop day by day an expertness in the whole field of price regulation certainly beyond that of the courts, which makes it reasonable that a protest should first be reviewed by this agency. Furthermore, as already pointed out, the Administrator is the only one with power to make adjustments or amendments. The Administrator may be convinced by the protest, and take appropriate action. If so, well and good. If not, further review is available in the Emergency Court and finally in the Supreme Court, on the basis of a proper administrative record and with the benefit of a considered written opinion by the Administrator explaining why he deemed the protest not to be well taken. We have already quoted from the Senate [fol. 83] committee report the reason why judicial review is channeled through this special court.

No doubt, the judicial review thus provided takes some time before a final adjudication can be reached. But it was not to be supposed that meritorious protests would, in the

[4] See footnote 3, *supra*.

great majority of cases, have to be pressed to the stage of judicial review. As it has worked out, considering the great number of commodities that have had to be regulated and the millions of people who have been subjected to the regulations, there have been surprisingly few complaints filed in the Emergency Court.[5] So far as individuals may suffer hardship and inconvenience because of the delay involved in the review procedure, this they must bear in the interest of the greater public good resulting from general compliance with the regulations until they are set aside or amended in an orderly way.

The District Court pointed out that in the present cases the regulation was not invalid on its face, but that the question whether it was arbitrary or capricious or failed to conform to the statutory standards depended upon a consideration of extrinsic economic data. In view of the broad separability clause in § 303 of the Act, the court quite properly confined its ruling under the Fifth Amendment to the facts of the cases before it. We shall observe the same caution. There might be a difference if the regulation as a pure matter of law were invalid on its face; if, for example, it covered a commodity which, under a proper construction of § 302(c), was exempted by Congress from price regulation. *Cf. Davies Warehouse Co.* v. *Brown*, United States Emergency Court of Appeals, May 28, 1943. We intimate no opinion on this.

We conclude that § 204(d), as applied to these appellants, is not bad under the Fifth Amendment.

[fol. 84] The Government has cited many cases as furnishing analogies bearing more or less directly on the present problem. See *Johnson* v. *United States*, 126 F. (2d) 242 (C. C. A. 8th, 1942); *American Bond & Mortgage Co.* v. *United States*, 52 F. (2d) 348 (C. C. A. 7th, 1931), certificate dismissed, 282 U. S. 374 (1931); *Bradley* v. *City of Richmond*, 227 U. S. 477, 485 (1913); *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440-41 (1907); *United States* v. *Vacuum Oil Co.*, 158 Fed. 536 (W. D. N. Y., 1908); *Lehigh Valley R. R. Co.* v. *United States*, 188 Fed. 879 (C. C. A. 3d, 1911). *Cf. White* v. *Johnson*, 282 U. S. 367, 373 (1931). It would unduly prolong this opinion to discuss the arguments and asserted distinctions which counsel have addressed to us with reference to these cases. We are

[5] To date 79 complaints have been filed.

satisfied with the conclusion we have reached, without relying on the props of precedent which some of these cases might afford us.

It is not amiss to note that in *Hirabayashi v. United States*, U. S. , June 21, 1943, under the war powers of the President and Congress, the Supreme Court upheld a military order which applied discriminatory treatment to citizens of the United States on the basis of their racial origin, a discrimination which would ordinarily be abhorrent to the Fifth Amendment. The Emergency Price Control Act discloses a much less striking exercise of the broad war power of Congress.

As a further argument against § 204(d) appellants contend that when Congress in § 205(c) vested in the district courts jurisdiction of criminal proceedings, the judicial power which such courts are thus called upon to exercise is derived from Article III of the Constitution and not from Congress; that the question of the relevancy of evidence offered in a criminal trial raises a question of law which must necessarily be decided by the court in the exercise of its judicial power; and that it is unconstitutional for Con- [fol. 85] gress to take from a court having jurisdiction to try a criminal indictment its judicial power to decide a question of relevancy.

But the answer is, that Congress has not taken from the district courts the judicial power to decide any question of relevancy of proffered evidence. The District Court exercised such power in these very cases. It ruled that the Emergency Price Control Act was a valid enactment, and that under the provisions of the Act the proffered evidence was not relevant. Appellants were indicted, not for a violation of the Administrator's price regulation, but for a violation of § 4(a) of the Act. Congress has said that it shall be a crime willfully to sell a commodity for a price in excess of that established by an outstanding price regulation, as long as such regulation has not been set aside by the statutory procedure. This is clearly the meaning and effect of the Act, though in § 204(d) Congress has expressed it in terms of denying "jurisdiction or power" to the courts to consider the validity of the regulation. Hence it was entirely immaterial to the criminal liability of these appellants whether Revised Maximum Price Regulation No. 169 might have been set aside had appellants chosen to avail

themselves of the procedure set forth in §§ 203 and 204 of the Act.

Nor have appellants been denied the right of a jury trial as guaranteed by the Sixth Amendment. They have had a jury trial on all the issues relevant under the statute.

Finally, the Act is challenged as constituting an unconstitutional delegation of legislative power to the Price Administrator. This point is not well taken. *Opp Cotton Mills, Inc.* v. *Administrator*, 312 U. S. 126 (1941); *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940); *Mulford* v. *Smith*, 307 U. S. 38 (1939); *Hirabayashi* v. *United States*, — U. S. —, decided June 21, 1943. The Emergency Price Control Act was upheld as against the challenge of [fol. 86] unconstitutional delegation in *Taylor* v. *Brown*, decided by the United States Emergency Court of Appeals, July 15, 1943. There is no need to repeat or elaborate what was said there.

The judgments of the District Court are affirmed.

On the same day, to wit, August 23, 1943, the following Judgment was entered:

JUDGMENT—August 23, 1943

This consolidated cause came on to be heard June 29, 1943, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now, to wit, August 23, 1943, here ordered, adjudged and decreed as follows: The judgments of the District Court are affirmed.

By the Court, Arthur I. Charron, Clerk.

Thereafter, to wit, on August 24, 1943, appellants filed a motion for stay of mandate which was allowed on August 30, 1943; and on August 27, 1943, appellee filed a motion to vacate stay of sentence which was denied on August 30, 1943.

[fol. 87] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 88] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is consolidated with No. 374 for argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.